

2004

State of Utah v. Richard Warren Pearson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20041096-CA
	:	UTAH COURT OF APPEALS
v.	:	BRIEF
	:	UTAH
RICHARD WARREN PEARSON,	:	DOCUMENT
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Defendant/Appellant.	:	.A10
	:	DOCKET NO. <u>20041096-CA</u>

BRIEF OF APPELLEE

APPEAL FROM A POST-JUDGMENT ORDER FOLLOWING CONVICTION ON PLEAS OF GUILTY TO THREE COUNTS OF MISUSE OF PUBLIC MONEY, IN VIOLATION OF UTAH CODE ANN § 76-8-402 (WEST 2004), ONE COUNT OF THEFT, IN VIOLATION OF UTAH CODE ANN. § 76-6-404 (WEST 2004), AND ONE COUNT OF COMMUNICATIONS FRAUD, IN VIOLATION OF UTAH CODE ANN. § 76-10-1801 (WEST 2004), ALL SECOND DEGREE FELONIES, IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK, PRESIDING

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ORAL ARGUMENT REQUESTED

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IN THE UTAH COURT OF APPEALS

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 v. :
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 RICHARD WARREN PEARSON, :
 :
 Defendant/Appellant. :

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDING

This is an appeal from the denial of a post-judgment order following conviction entered on guilty pleas to three counts of misuse of public money, one count of theft, and one count of communications fraud, all second degree felonies, in violation of Utah Code Ann. §§ 76-8-402, 76-6-404, and 76-10-1801, respectively (R. 2-6) (statutes attached in **Addendum A**). This Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

**STATEMENT OF THE ISSUES ON APPEAL AND
STANDARDS OF APPELLATE REVIEW**

The trial court imposed at sentencing the total restitution figure contained in the presentence investigation report without objection by defendant and provided for a restitution hearing in the event post-sentencing negotiations failed. The court later denied defendant's post-sentencing motion for a restitution hearing and reaffirmed its restitution order.

Point 1: Did the sentencing court properly deny defendant's post-sentencing request for a restitution hearing where the sentencing court ordered that a restitution hearing would occur if one was required following post-sentencing negotiations, and defendant fails to establish that restitution remained undecided when he requested a hearing seven months later?

This Court will not disturb a restitution order unless the trial court abused its discretion or exceeded its authority. *See State v. Bickley*, 2002 UT App 342, ¶ 5, 60 P.3d 582; *State v. Mast*, 2001 UT App 402, ¶ 7, 40 P.3d 1143; *State v. Weeks*, 2000 UT App 273, ¶ 7, 12 P.3d 110, *aff'd*, 2002 UT 98, 61 P.3d 1000. This Court reviews a trial court's interpretation of the restitution statutes for correctness. *See Bickley*, 2002 UT App 342, ¶5.

Defendant bears the burden of providing record support for his claim of error, absent which this Court cannot rule on the claim. *See State v. Wetzel*, 868 P.2d 64, 67 (Utah 1993).

Point 2: Does the record sufficiently reveal the reasoning behind the restitution decision and reasonably support the assumption that the sentencing court considered the relevant statutory factors in reaching its decision?

This issue was not raised below and, thus, may be reviewed only for plain error. Defendant must establish an error that 1) should have been obvious to the trial court, and 2) prejudiced him. *See State v. Brown*, 856 P.2d 358, 363 (Utah App. 1993).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The issues involve the restitution provisions in Utah Code Ann. § 77-38a-302 (West 2004), a copy of which is attached in **Addendum B**.¹

STATEMENT OF THE CASE

Defendant was charged with three counts of misusing public money, one count of theft, and one count of communications fraud, all second degree felonies, for conduct occurring between October 15, 1999, and May 23, 2003 (R. 2-6). He waived his preliminary hearing and ultimately entered guilty pleas to all five charges (R. 22, 32-33, 34-41). The court ordered preparation of a presentence investigation report (R. 33) (report attached at **Addendum C**).

At sentencing on February 20, 2004, defendant stated that he “agree[d] with the recommendations in the pre-sentence report” involving probation and concurrent sentencing (R. 90: 3) (sentencing transcript attached at **Addendum D**). He noted that he found the report to be “thoughtful[,]” to be accurate in its recognition that defendant had no criminal history, and to be correct in its account of his motivations (*id.*).

¹Before 2002, restitution proceedings were governed by Utah Code Ann. § 76-3-201, *et seq.* Thereafter, the Crime Victims Restitution Act was enacted to govern the imposition of restitution. *See* Utah Code Ann. § 77-38a-101 *et seq.* (West 2004). Because the Act incorporates largely the same language as former section 76-3-201, earlier case law interpreting the former statute governs this case. *See State v. Weeks*, 2002 UT 98, ¶ 2 n.1, 61 P.3d 1000 (recognizing that the analysis with respect to section 77-38a-302(3) and (4), among others, remains the same as under the previous statutes because “no substantive modifications were made to the provisions).

The prosecutor then pointed out:

... I know the Court is well aware of this case, but the State, in a sense, is truly the victim in this case, as opposed to where we stand in place of the victim, where Mr. Pearson had the gate-keeper function at the Division of Alcohol Beverage Control, was responsible for improper use of State funds and in the discharge of his duties, misappropriated over \$130,000, of which \$53,793 went directly to his personal accounts.

In addition, since these charges were filed, the A.B.C. was required to pay off a Costco credit card bill, the entirety of which were purchases for Mr. Pearson's personal benefit. That amounts to \$6,856. We're requesting restitution in the amount of \$60,649.

I believe that Mr. Pearson is contesting the restitution and so we'd be asking the Court to set a restitution hearing.

(R. 90: 4-5). Following a question by the court, the prosecutor clarified that the presentence investigation report's figure of \$131,541.13 did not include the \$6,800 figure

(R. 90: 5). Instead, the number in the report was

... the total amount misappropriated; however, the auditors also determined about 76,000 were improper disbursements, but went to the benefit of the department or other department members. And so, they're not quite sure [at the Utah State Auditor's Office] how to deal with that and your Honor's going to have to decide that at the restitution hearing.

(*Id.*).

The judge then sentenced defendant to serve five consecutive sentences of one-to-fifteen years in prison, suspended the prison terms, and placed defendant on probation subject to, among other things, his payment of "restitution in the amount of \$131,541.14 until such time and if that number is modified by this Court" (R. 90: 6). Add. D. The court then clarified

I am of the view at this stage that the restitution sum will be as I've indicated unless I modify it and that leaves open the potential for negotiation between your lawyer and those at the State who do have knowledge about what their records reflect. If there is no satisfactory conclusion by either party, then you're to notify this Court, [defense counsel], and I will set the matter for an evidentiary hearing. . . . At which time, all of the claims will be inquired into and a determination will be made; but until and unless that occurs, the number is now specified.

(R. 90: 7). Add. D. The hearing ended without a single objection by defendant.

Defense counsel withdrew the following July (R. 52-54), and in September—seven months after imposition of sentence—defendant, through new counsel, filed a motion for a restitution hearing and a request for discovery (R. 55-56) (both motions attached in **Addendum E**). He merely stated his request for a hearing and sought “documentation as to how the [r]estitution amount of \$131,541.13 was calculated” (*id.*). The State responded that the request was untimely and was barred by laches (R. 57-59), and the court set the matter for hearing (R. 60-61).

At the November hearing on the motion, defendant argued that the statute does not mandate that a request for a restitution hearing be made at sentencing and that the State's laches argument was not well-taken (R. 92: 2-3) (hearing transcript attached at **Addendum F**). Defense counsel then proffered:

We've taken the liberty of having a C.P.A. work over all these materials and prepare what we believe is the accurate state of affairs as to what happened. And we are claiming that there is \$25,000 that has been paid back [that] he's not getting credit for, that there's numerous pieces of merchandise, personalty, which he misappropriated by buying and all those items are in possession of the State. There's \$40,000 worth of gym equipment, that's what it cost; another 15 or \$20,000 worth of other

miscellaneous personalty, including but not limited to, the director's desk, which he is using at the present time, and a table, that's about \$5,000.

And we want, number one, obviously, to get some sort of relief over the \$25,000 that we say has been repaid and also, some sort of set-off or possession of the items which were required to pay for of the personalty nature [sic].

(R. 92: 3-4). Add. F. The State responded:

The defendant's attorney at [the sentencing hearing] . . . had all the information and made no objection or request to review the restitution amount at that time. It is my opinion that the defendant's current situation needs to be taken up at AP&P, who is monitoring his restitution, if he should be credited with items that are in the possession of the State, I have no objection to that, but that is the concern of AP&P, not this Court or me.

Therefore, I don't think a restitution hearing is the avenue that we need to follow in order to determine what exactly he owes. An inventory by AP&P of what the State has would be much more suitable.

(R. 92: 5). Add. F.

The judge took the matter under advisement, noting that he was "trying to grapple with the question of whether or not because now counsel has changed, there has been a waiver of the right under the statute to claim a restitution hearing" (R. 67-68; R. 92: 5).

Add. F.

The court thereafter ruled

Pursuant to Utah Code Ann. § 77-38a-302(4), Defendant's request is untimely as the motion was not made, nor any objection voiced, until seven months after the sentencing. Moreover, *the presentence report in this case provides an accurate outline of the amounts misused and their destinations, and defendant had access to this report and the discovery which detailed the State's accounting. Finally, in State v. Weeks, 2002 UT 98, 61 P.3d 1000, the Utah Supreme Court held that restitution based upon the*

information in a presentence report is a sufficient basis upon which the Court may determine an order of restitution.

(R. 69-70) (emphasis added) (order attached at **Addendum G**). Defendant timely appealed from this written order (R. 71-72).

STATEMENT OF THE FACTS²

Defendant was employed at the Utah Department of Alcoholic Beverage Control [“DABC”] until May 23, 2003, as the general accountant (R. 4). His responsibilities included “making payments and accountings of public monies used to operate DABC” (*id.*).

DABC had an operating account and a petty cash account at Bank One (*id.*). Defendant had a personal bank account at Beehive Credit Union, together with an account for Sparta United Soccer to which he had access (*id.*). Prior to October 15, 1999, he opened an unofficial and unauthorized DABC account at the same credit union, naming himself as trustee for the DABC Candy Account and using his personal tax identification number/social security number (*id.*). Defendant claimed that the account was set up to handle proceeds from the candy machines, which proceeds were to be used to purchase additional candy for the machines, obtain fitness equipment, and fund Christmas incentives and gift certificates for DABC employees (*id.*).

²Unless otherwise specified, all facts are taken from the probable cause statement on which the presentence investigation report was based (R. 4-6).

On March 13, 2003, Agent Doug Townsend, an Investigator for the State Bureau of Investigation, followed up on a confidential report that defendant was authorizing payment of DABC funds to pay for embroidery for Sparta United Soccer uniforms and equipment (*id.*). He determined that a “hard audit” of the DABC books had not occurred for approximately three years, and the State Auditor’s Office agreed to examine the accounts for the years between 1999 and 2002 (R. 4-5).

That audit revealed a mishandling of public monies. Defendant would advance money to an employee from the petty cash account at Bank One, then put the repayment by the employee into defendant’s personal accounts at the credit union (R. 5). He would also disburse money from the petty cash account and deposit it directly into his credit union accounts, use it to pay his personal bill at Costco, or apply it toward gift certificates for employee incentives (*id.*).

DABC participated in a recycle incentive program in which it received money for recycling the cardboard boxes from State Liquor Stores (*id.*). Defendant intercepted the money sent to DABC and deposited it into his account and the Sparta Soccer account at the credit union (*id.*).

On March 4, 2003, Ken Wynn, Director of the DABC, confronted defendant about the use of DABC funds to pay for the soccer uniforms and equipment (*id.*). Defendant assured him that Sparta United Soccer had reimbursed the DABC \$25,777.22 for all of the money DABC had spent on its behalf (*id.*). The audit verified the payment to DABC,

but revealed that defendant had deposited only \$6,755.32 of that amount into one of the credit union accounts (none of which was an authorized DABC account) and put the rest of the payment into the petty cash account at Bank One, which he later redistributed without documentation (R. 4-5).

The audit also revealed that between 1999 and 2002, defendant disbursed money from the Bank One petty cash account, without documentation, as follows:

- \$1,040.00 deposited to the credit union candy account;
- \$3,139.00 cashed;
- \$6,550.00 cashed;
- \$9,390.00 advanced on wages to DABC employee;
- \$4,512.50 purchased employee gift certificates from Harmons for Christmas bonuses;
- \$6,160.00 to HRS/Costco on defendant's personal account;
- \$5,350.00 to DABC;
- \$18,107.66 one disbursement payable to defendant; and
- \$12,020.00 in cash back from various deposits.

(*Id.*). When defendant advanced petty cash money to an employee, he would deposit that employee's paycheck into the credit union candy account, from which he disbursed funds to himself without documentation or written authority (R. 5-6).

The audit revealed that defendant misappropriated approximately \$131,541.13 from DABC (R. 6).

SUMMARY OF ARGUMENTS

Point I: This Court cannot review defendant's claim that the trial court erroneously denied his request for a restitution hearing because defendant fails to provide record support that he was entitled to the hearing at the time of his request. When the

prosecutor requested a restitution hearing at sentencing, the court provided that it would grant one if post-sentencing negotiations between the parties failed to settle the issue of restitution. Defendant's summary claim on appeal that those negotiations failed is entirely unsupported by the record and prevents this Court from reviewing his claim. The record supports a reasonable inference that negotiations not only occurred but were successfully concluded, negating any need for a restitution hearing. Accordingly, this Court is unable to review defendant's first argument.

Point II: This Court should also refuse to reach defendant's claim that the sentencing court neither made a record of the reasoning behind its restitution decision nor considered the relevant statutory factors identified at Utah Code Ann. § 77-38a-302(5)(b) & (c). First, defendant failed to make any timely or specific objection on either basis below, thereby robbing the sentencing court of any opportunity to address his concerns. Second, defendant fails to establish plain error on appeal where his argument is premised on the court's failure to put its restitution reasoning on the record. Here, the record adequately reveals the reasoning underlying the restitution order.

ARGUMENTS

POINT I

THE ABSENCE OF RECORD SUPPORT FOR DEFENDANT'S FIRST CLAIM PREVENTS APPELLATE REVIEW

Defendant argues that the trial court erroneously denied his motion for a restitution hearing after having "promised" a hearing if post-sentencing negotiations "were

unproductive.” Aplt. Br. at 11-17. This Court is unable to review the claim, however, because defendant fails to provide record support for a key part of his claim.

Parties claiming error on appeal have a duty and responsibility to support their allegations with an adequate record. *See State v. Snyder*, 932 P.2d 120, 131 (Utah App. 1997). ““This Court simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record.”” *Id.* (quoting *State v. Barella*, 714 P.2d 287, 288 (Utah 1986) (additional quotation omitted)). In the face of “an [in]adequate record on appeal, this Court must assume the regularity of the proceedings below.” *State v. Miller*, 718 P.2d 403, 405 (Utah 1986) (per curiam); *State v. Blubaugh*, 904 P.2d 688, 699 (Utah App. 1995) (assuming regularity of proceedings below because appellant failed to include transcript on appeal), *cert. denied*, 913 P.2d 749 (Utah 1996).

Many of the circumstances relevant to defendant’s restitution claim are apparent on the record. Restitution was not likely to exceed the \$131,541.13 amount noted in the presentence report. The issue throughout the proceedings below was whether defendant could obtain any credit for items purchased with the misappropriated funds but remaining in the possession of DABC. Defendant knew when he entered his guilty pleas that restitution would be imposed and could be as much as around \$130,000.00 (R. 89: 11-13). At the same time, defendant was working to obtain the credit or off-set (R. 89: 11-12). The parties had been negotiating the point and successfully requested that the court delay sentencing to permit continued negotiations (R. 89: 11-13).

The presentence investigation report included defendant's claim to a set off amount, and defendant elaborated on the matter in his written statement attached to the report (R. 88). Add. C.

At sentencing, the parties had not yet reached agreement on the issue of defendant's claimed set off amount, and the prosecutor requested a restitution hearing (R. 90: 5). Add. D. With that in mind, together with the information contained in the presentence report and with the knowledge that negotiations had been occurring, the sentencing judge entered a restitution order for the maximum amount misappropriated by defendant, and granted the restitution hearing in a manner which provided incentive for the parties to continue negotiations:

I am of the view at this stage that the restitution sum will be as I've indicated unless I modify it and that leaves open the potential for negotiation between your lawyer and those at the State who do have knowledge about what their records reflect. If there is no satisfactory conclusion by either party, then you're to notify this Court, [defense counsel], and I will set the matter for an evidentiary hearing. . . . At which time, all of the claims will be inquired into and a determination will be made; but until and unless that occurs, the number is now specified.

(R. 90: 7). Add. D. Neither party objected to this decision, both apparently satisfied that they could continue with the negotiations in which they had previously been engaged.

Five months later, defense counsel moved to withdraw "based on the fact that all legal services for which Counsel was retained have been completed and resolved" (R. 52). Add. E. The court granted the motion three days after it was filed (R. 54). The next entry in the record is the appearance two months later of new defense counsel who immediately "requests

a Restitution Hearing” on behalf of defendant and seeks “documentation as to how the Restitution amount of \$131,541.13 was calculated” (R. 55). Add. E. The trial court ultimately denied defendant’s motion (R. 69). Add. G.

It is in the context of this set of circumstances that defendant makes his appellate claim that he was not granted the restitution hearing to which he was statutorily entitled. Aplt. Br. at 11-16. The problem lies with the absence of record support for the claim that defendant was entitled to a restitution hearing when he filed his written request for one. *Id.* at 8, 11, 15. The order at sentencing granted a restitution hearing only if one was necessary. Clearly, if post-sentencing negotiations were successful, no restitution hearing would be held as none would be necessary. In other words, defendant would not have been entitled to a restitution hearing, and his request for one would have been properly denied.

Defendant claims numerous times on appeal that negotiations occurred following entry of the sentencing order but failed to produce a satisfactory result: “[t]he parties never reached an agreement as to the amount of restitution”; “the parties had been unable to determine a mutually acceptable restitution figure”; “negotiations failed”; “at the trial court’s instruction, Mr. Pearson initially attempted to resolve the matter through negotiations”; defendant renewed his request for a restitution hearing “when it was clear that negotiations between Mr. Pearson and the State were not going to produce a mutually amicable result;” “Mr. Pearson waited several months in attempts to reach an agreement with the state”. Aplt.

Br. at 8, 11, 15. None of these statements include a citation to the record, however, because there is no record support for them.

Defendant bears the burden of providing record support for his appellate claims. *See State v. Wetzel*, 868 P.2d 64, 67 (Utah 1993). He has failed to meet that burden here. Defendant never made that claim below. His motion and his argument at the hearing on his motion are devoid of any mention of the negotiations or their outcome. He never reminded the trial court of the sentencing ruling which provided for the grant of a restitution hearing of negotiations were unsuccessful. He never explained why his motion was not filed until seven months after sentencing. He did not argue below that prior counsel failed to follow through with, or otherwise act upon, the negotiation requirement in the sentencing order and makes no claim to this Court of ineffective assistance of prior counsel. Instead, the argument appears for the first time on appeal that the negotiations occurred, they failed, and defendant was entitled to the hearing “promised” by the sentencing judge.

Where a defendant fails to provide the requisite record support for his appellate claim, this Court should reject his argument and assume the regularity of the trial court proceedings. *See Miller*, 718 P.2d 405. Here, this Court should reject defendant’s unsupported claim that the negotiations failed and, hence, provided a basis for his untimely motion for a restitution hearing.

The record supports both the existence and the success of the negotiations. The parties had actively negotiated the issue up until sentencing. No one objected to the trial

court's suggestion of continued negotiation post-sentencing. No one informed the trial court at any time thereafter that negotiations had occurred or that they had reached "no satisfactory conclusion[,]” as required by the court's order before a restitution hearing would be scheduled (R. 90: 7). Instead, the record is silent for five months, after which defendant's first counsel withdraws, claiming that "all legal services for which Counsel was retained have been completed and resolved" (R. 52). Add. E. The same counsel never sought a restitution hearing following sentencing, strongly suggesting that none was necessary due to the outcome of the negotiations. Defendant did not object to or otherwise contradict the reasoning set forth in his counsel's motion to withdraw.

The reasonable interpretation of these facts is that negotiations occurred and were satisfactorily completed before defense counsel withdrew. Satisfactory negotiations defeat defendant's ability to obtain a restitution hearing (R. 90: 7). Because defendant's claim of a right to a restitution hearing rests on a unilateral allegation of failed negotiations which enjoys no record support, his claim should be deemed waived and the denial of his motion below affirmed. *See State v. Wulffenstein*, 657 P.2d 289, 293 (Utah 1982) (the appellate court "cannot rule on a question which depends for its existence upon alleged facts unsupported by the record").

POINT II

DEFENDANT WAIVED HIS RIGHT TO CONTEST BOTH THE DISTRICT COURT'S CONSIDERATION OF THE STATUTORY RESTITUTION FACTORS AS WELL AS THE RECORDING OF REASONING BEHIND THE RESTITUTION AMOUNT

Defendant argues that the district court failed to follow the statutory mandates in imposing restitution. Aplt. Br. at 17-22. Specifically, he argues that the trial judge did “not consider[] any of the relevant factors” outlined in section 77-38a-302(5) before setting the restitution figure at the sentencing hearing. Aplt. Br. at 18, 20. He also contends that the trial judge failed to make “the reasons for its decision part of the record” as required by section 77-38a-302(3). Aplt. Br. at 17-18. These failures, he argues, prevent him from challenging the findings underlying the court’s decision and warrant a remand for a full restitution hearing. *Id.* at 21-22.

This Court need not reach defendant’s arguments because defendant waived these claims by failing to assert them below. *See State v. Weeks*, 2002 UT 98, ¶ 22, 61 P.3d 1000. In any event, the record reveals that the trial court properly considered the relevant factors and expressly noted the reasoning for his decision on the record.

A. Few of the Statutory Factors are Relevant

Utah Code Ann. § 77-38a-302(5)(b) provides:

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

- (i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;
- (ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
- (iii) the cost of necessary physical and occupational therapy and rehabilitation;
- (iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;
- (v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and
- (vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

Subsection (5)(c) provides:

- (c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsections (5)(a) and (b) and:
 - (i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;
 - (ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
 - (iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines may make restitution appropriate.

Utah Code Ann. § 77-38a-302(5)(c).

The factors listed in subsection (b) are largely irrelevant to this case, with the exception of subsection (i) which involves damage or loss to the victim. The factors in subsection (c) generally apply here. However, the lists contained in the statute are not all inclusive, and the trial court is permitted to consider all relevant facts, even those not listed in the statute, in making an appropriate restitution decision. *See* Utah Code Ann. § 77-38a-302(5)(b) (“ . . . the court shall consider *all* relevant facts . . . ”) (emphasis added).

B. Preservation

“ “[A]s a general rule, claims not raised before the trial court may not be raised on appeal.”” *State v. Smith*, 2003 UT App 179, ¶ 27, 72 P.3d 692 (quoting *State v. Cram*, 2002 UT 37, ¶ 9, 46 P.3d 230) (additional quotation omitted), *cert. denied*, 84 P.3d 239 (Utah 2003). To preserve a claim for appellate review, the defendant must make “ “a contemporaneous objection” ” or offer “ “some form of specific preservation of claims of error” ” on the trial court record. *State v. Brown*, 856 P.2d 358, 360 (Utah App.1993) (quoting *State v. Tillman*, 750 P.2d 546, 551 (Utah 1987)); *see also State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551; *State v. Whittle*, 780 P.2d 819, 820-21 (Utah 1989); *Smith*, 2003 UT App 179, ¶ 27.

Defendant had multiple opportunities to alert the court to his concerns, not only at the sentencing hearing, but before sentencing when he was negotiating restitution with the State,

when he filed his motion requesting a restitution hearing, when he appeared for the motion hearing before the sentencing judge, and when the judge entered his final written order. Defendant, however, stated no objection on either basis before or during sentencing, remained silent for seven months thereafter, and at the November hearing opted to contest the amount of the restitution order without mentioning the statutory mandates he now contends were ignored (R. 92: 3-4). He similarly remained silent after the court issued its written order denying a restitution hearing, again foregoing an opportunity to alert the trial court to his concerns regarding the statutory factors and the reasoning upon which the restitution order was based. Defendant's failure at each opportunity to alert the trial court about his concerns prevented the court from addressing either issue below. Defendant has, therefore, waived his right to appellate review of his arguments. *See Weeks*, 2002 UT 98, ¶ 22 (defendant's failure at the restitution hearing to object to the court's alleged failure to reference the statutory factors on the record waived any appellate challenge on that issue); *Cram*, 2002 UT 37, ¶ 9 (“[T]he doctrine of waiver has application if [a] defendant[] fail[s] to raise claims at the appropriate time at the trial level, so the judge has an opportunity to rule on the issue.”); *Smith*, 2003 UT App 179, ¶ 27 (quoting *State v. Emmett*, 839 P.2d 781, 783-84 (Utah 1992)) (additional quotation omitted). *Cf. James v. Galetka*, 965 P.2d 567, 574 (Utah App. 1998) (noting that any error in considering restitution factors should have been brought to the immediate attention of the sentencing judge), *cert. denied*, 982 P.2d 88 (Utah 1999).

Recognizing that he made no specific objections below, defendant claims that objections concerning the amount and determination of restitution were raised by the trial court *sua sponte* at sentencing, thereby relieving defendant of his burden. Aplt. Br. at 22-23. He claims that the trial court not only *sua sponte* raised the issue “that it needed to make the reasons for its restitution decision part of the record” but “indicated it would do so during the restitution hearing.” *Id.* at 23, 24. The trial court’s comments at sentencing do not reasonably lend themselves to this interpretation.

The trial judge recognized “the potential for negotiation” that existed between the parties and explained that should such negotiations occur without a “satisfactory conclusion,” the parties could return to the court (R. 90: 7). This did nothing, however, to preserve defendant’s specific claims relating to statutory mandates. The trial court ordered a specific amount of restitution at sentencing and expressly noted that “the number is now specified” and that “the restitution sum will be as I’ve indicated” (*id.*). He made it clear that, barring any further action of the court, the order was final (*id.*). Hence, absent a proper request to revisit the issue, the trial court reasonably anticipated that the restitution issue was decided and its order was complete and final. On this record, no such request occurred, leaving the restitution order intact. *See* Point I, *supra*.

In any event, nothing in his ruling suggests that the judge believed the order was not a statutorily-compliant final order of restitution. His subsequent reaffirmation of the restitution order expressly noted what the record at the sentencing hearing had already made

clear: the judge relied on the presentence report and the information it contained (R. 69-70).

Hence, the trial court did not, *sua sponte*, recognize any concern for either his reasoning or his consideration of statutory factors. Defendant was not relieved of his duty to make the necessary specific and timely objection to preserve his appellate claims, and his failure to do so prevents appellate review of his claims.

C. Plain Error

Defendant asserts alternatively that plain error excuses his failure to preserve his claims for appellate review. Aplt. Br. at 23-24. However, the record refutes defendant's assertion.

To establish plain error, defendant must first establish that an error exists that 1) should have been obvious to the trial court, and 2) was of sufficient magnitude that it affected his substantial rights—i.e., prejudiced him. *State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996); *Brown*, 856 P.2d at 363.

Defendant argues that the claimed error was obvious because the trial court was aware of the statutory mandates to consider the relevant factors and to include in the record the reasoning for the restitution decision. Yet, defendant contends, the trial court failed to detail on the record “the reason as to how it determined” the restitution amount.³ Aplt. Br. at 24. The harm, he claims, arose because the court's failure to state those reasons made it “impossible for the defendant to contest the amount.” *Id.*

³To the extent defendant argues that the court was required to give a detailed financial accounting of its restitution decision, he cites no authority for that proposition.

Defendant's claims both fail because the court in fact put on the record the basis for its restitution determination. Subsection 302(5)(b) requires only that "the court shall consider all relevant facts" in formulating a restitution award, including, but not limited to, the factors listed in the statute. Utah Code Ann. § 77-38a-302(5)(b). Subsection 302(3) provides that "the court shall make the reasons for the [restitution] decision part of the court record." Utah Code Ann. § 77-38a-302(3). These sections do not require "that a sentencing court make a record setting forth its reasoning as to each of the factors in its restitution order, only that it *consider* each factor and make a record setting forth the reasons for its decision." *Weeks*, 2002 UT 98, ¶¶ 23, 25, n.11 (emphasis in original); *see, e.g., State v. Strunk*, 846 P.2d 1297, 1299 (Utah 1993) (so long as the judge was familiar with defendant's background prior to imposing the sentence, the law does not require the judge to list or discuss either the aggravating and mitigating factors or the reasons for imposing an indeterminate-term sentence).

Where "it is reasonable to do so[.]" this Court may "assume that the trial court considered all of the factors set forth in Utah Code Annotated section [77-38a-302(3).]" *Smith*, 2003 UT App 179, ¶ 30 n.9 (citing *Weeks*, 2002 UT 98, ¶ 24). Such an assumption is not warranted in situations "where (1) an ambiguity of facts makes the assumption unreasonable, (2) a statute explicitly provides that written findings must be made, or (3) a prior case states that findings on an issue must be made." *State v. Helms*, 2002 UT 12, ¶ 11, 40 P.3d 626 (citing *State v. Robertson*, 932 P.2d 1219, 1234 (Utah 1997)) (additional

citations omitted). Detailed findings of fact are not required in this situation. *See Weeks*, 2002 UT 98, ¶¶ 23-24; *see also Smith*, 2003 UT App 179, ¶ 29, 72 P.3d 692; *State v. Haston*, 811 P.2d 929, 937 (Utah App. 1991) (formal findings of fact are not necessary under the statute), *rev'd on other grounds*, 846 P.2d 1276 (Utah 1993). Neither are the facts ambiguous, as established in the presentence investigation report and defendant's expressed agreement with its thoughtfulness and accuracy (R. 88; R. 90: 3).

In this case, the basis for the trial court's restitution order was obvious: the presentence investigation report. It was the only evidence before the district court that reflected the total amount of misappropriated funds. Far from generating an "arbitrary" figure, as defendant claims, the report detailed how the misappropriations occurred and presented the figure as "the aggregate of misappropriated disbursements from the DABC petty cash account at Bank Once, recycling incentive money, which was never deposited into an official DABC account, and DABC money used to pay for Sparta United Soccer clothing and equipment" (R. 88: 2-5). It contained specific information concerning defendant's shuffling of funds from and between various accounts, defendant's failure to document many of the transactions, defendant's claims of set-offs, and the State Auditor's determination of documented and undocumented disbursements.

In addition, the report contained information relating to the factors listed in section 77-38a-302(5)(c), including defendant's "stable life," "substantial incoming retirement," and detailed household income and financial obligation information which permitted the report

to ultimately recommend that “he immediately begin making restitution while incarcerated” (R. 88: 3, 6-7).

At the sentencing hearing, the district court judge noted that he had “received and reviewed” the report (R. 90: 2-3). He then heard the argument of both parties, including defendant’s praise of the report’s content and thoughtfulness, and both parties’ agreement with the recommendations of AP&P in the report (R. 90: 3-5). The prosecutor noted some specific amounts that defendant used for his personal benefit, and the judge sought clarification of how those amounts related to the information in the presentence report (R. 90: 5). The judge thereafter ordered restitution in the same amount identified in the report as the total amount of misappropriated funds (R. 88: 2, 3, 5; R. 90: 6). No other source of information provided that figure to the court. The lack of elaboration in the order does not prevent the reasonable assumption that the sentencing judge considered the information and reasoning of the report. *See Helms*, 2002 UT 12, ¶ 12.

The court’s subsequent written order renders the judge’s reliance on the report indisputable:

Pursuant to Utah Code Ann. § 77-38a-302(4), Defendant’s request is untimely as the motion was not made, nor any objection voiced, until seven months after the sentencing. Moreover, *the presentence report in this case provides an accurate outline of the amounts misused and their destinations, and defendant had access to this report and the discovery which detailed the State’s accounting. Finally, in State v. Weeks*, 2002 UT 98, 61 P.3d 1000, the Utah Supreme Court held that restitution based upon the information in a presentence report is a sufficient basis upon which the Court may determine an order of restitution.

(R. 69) (emphasis added).

Nowhere in the record does the sentencing judge make any exception as to the credibility of the contents of the presentence report, and defendant establishes none. The circumstances surrounding the restitution order in this case permit the reasonable assumption that the sentencing judge adopted not only the “accurate outline” of the calculations in the presentence report, but the remainder of the report’s reasoning as to the factors relevant to subsection 302(5)(c) as well. *See Smith*, 2003 UT App 179, ¶ 30; *see also Weeks*, 2002 UT 98, ¶¶ 24, 25, n.11 (acknowledging that appellate court may assume that the sentencing court considered the statutory factors, and disavowing any requirement that the sentencing court list every statutory factor when rendering its restitution decision).

Accordingly, the reasoning behind the restitution order is apparent on the record, including consideration of the relevant statutory factors, and defendant’s claim of plain error—entirely based on the trial court’s alleged failure to state the reasons for its restitution award—fails. *See Weeks*, 2002 UT 98, ¶ 25 (refusing to reach an alleged error in the sentencing court’s restitution order where defendant failed to raise the claim below or to establish plain error on appeal).⁴

⁴Even if this Court were to determine that the trial court failed to adequately set forth in the record the reasoning for its restitution decision, the remedy would not be the restitution hearing defendant seeks. *Aplt. Br.* at 21-22, 25. Instead, the matter should be remanded to the trial court with an order for the judge to comply with the statute by giving “an explanation of its decision which demonstrates that it has taken into account the appropriate statutory factors.” *Weeks*, 2000 UT App 273, ¶ 17 n.8 (quoting *Monson v. Carver*, 928 P.2d 1017, 1028 (Utah 1996)).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the trial court's denial of defendant's motion for a restitution hearing.

ORAL ARGUMENT REQUESTED

The State requests oral argument. “[O]ral argument is a tool for assisting the appellate court in its decision making process,” *Perez-Llamas v. Utah Court of Appeals*, 2005 UT 18, ¶ 10, 110 P.3d 706, and “the only opportunity for a dialogue between the litigant and the bench.” *Moles v. Regents of University of California*, 187 Cal. Rptr. 557, 560 (Cal. 1982). In the case at bar, the decisional process would “be significantly aided by oral argument.” Utah R. App. P. 29(a).

RESPECTFULLY SUBMITTED this 22nd day of July, 2005.

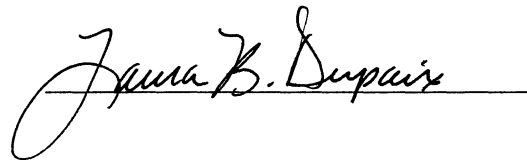
MARK L. SHURTLEFF
Utah Attorney General

A handwritten signature in black ink, appearing to read "Kris C. Leonard" or similar, written in a cursive style.

KRIS C. LEONARD
Assistant Attorney General

CERTIFICATE OF DELIVERY

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were hand/delivered or mailed first class postage prepaid to Peter D. Goodall, YENGICH, RICH & XAIZ, attorneys for defendant/appellant, 175 East 400 South, Suite 400, Salt Lake City, Utah 84111, this 22nd day of July, 2005.



Addenda

Addendum A

§ 76-6-404. Theft—Elements

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Laws 1973, c. 196, § 76-6-404.

§ 76-8-402. Misusing public monies

(1) Every public officer of this state or a political subdivision, or of any county, city, town, precinct, or district of this state, and every other person charged, either by law or under contract, with the receipt, safekeeping, transfer, disbursement, or use of public monies commits an offense if the officer or other charged person:

(a) appropriates the money or any portion of it to his own use or benefit or to the use or benefit of another without authority of law;

(b) loans or transfers the money or any portion of it without authority of law;

(c) fails to keep the money in his possession until disbursed or paid out by authority of law;

(d) unlawfully deposits the money or any portion in any bank or with any other person;

(e) knowingly keeps any false account or makes any false entry or erasure in any account of or relating to the money;

(f) fraudulently alters, falsifies, conceals, destroys, or obliterates any such account;

(g) willfully refuses or omits to pay over, on demand, any public monies in his hands, upon the presentation of a draft, order, or warrant drawn upon such monies by competent authority;

(h) willfully omits to transfer the money when the transfer is required by law; or

(i) willfully omits or refuses to pay over, to any officer or person authorized by law to receive it, any money received by him under any duty imposed by law so to pay over the same.

(2) A violation of Subsection (1) is a felony of the third degree, except it is a felony of the second degree if:

(a) the value of the money exceeds \$5,000;

(b) the amount of the false account exceeds \$5,000;

(c) the amount falsely entered exceeds \$5,000;

(d) the amount that is the difference between the original amount and the fraudulently altered amount exceeds \$5,000; or

(e) the amount falsely erased, fraudulently concealed, destroyed, obliterated, or falsified in the account exceeds \$5,000.

(3) In addition to the penalty described in Subsection (2), a public officer who violates Subsection (1) is subject to the penalties described in Section 76-8-404.

Laws 1973, c. 196, § 76-8-402; Laws 1995, c. 232, § 6, eff. May 1, 1995; Laws 1999, c. 106, § 22, eff. July 1, 1999.

§ 76-10-1801. Communications fraud—Elements—Penalties

(1) Any person who has devised any scheme or artifice to defraud another or to obtain from another money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions, and who communicates directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice is guilty of:

(a) a class B misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is less than \$300;

(b) a class A misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is or exceeds \$300 but is less than \$1,000;

(c) a third degree felony when the value of the property, money, or thing obtained or sought to be obtained is or exceeds \$1,000 but is less than \$5,000;

(d) a second degree felony when the value of the property, money, or thing obtained or sought to be obtained is or exceeds \$5,000; and

(e) a second degree felony when the object of the scheme or artifice to defraud is other than the obtaining of something of monetary value.

(2) The determination of the degree of any offense under Subsection (1) shall be measured by the total value of all property, money, or things obtained or sought to be obtained by the scheme or artifice described in Subsection (1) except as provided in Subsection (1)(e).

(3) Reliance on the part of any person is not a necessary element of the offense described in Subsection (1).

(4) An intent on the part of the perpetrator of any offense described in Subsection (1) to permanently deprive any person of property, money, or thing of value is not a necessary element of the offense.

(5) Each separate communication made for the purpose of executing or concealing a scheme or artifice described in Subsection (1) is a separate act and offense of communication fraud.

(6)(a) To communicate as described in Subsection (1) means to bestow, convey, make known, recount, impart; to give by way of information; to talk over; or to transmit information.

(b) Means of communication include but are not limited to use of the mail, telephone, telegraph, radio, television, newspaper, computer, and spoken and written communication.

(7) A person may not be convicted under this section unless the pretenses, representations, promises, or material omissions made or omitted were made or omitted intentionally, knowingly, or with a reckless disregard for the truth.

Laws 1985, c. 157, § 2; Laws 1990, c. 79, § 1; Laws 1995, c. 291, § 24, eff. May 1, 1995.

Addendum B

§ 77-38a-302. Restitution criteria

(1) When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, a victim has the meaning as defined in Subsection 77-38a-102(13) and in determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5).

(2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant.

(b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing.

(c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5).

(3) If the court determines that restitution is appropriate or inappropriate under this part, the court shall make the reasons for the decision part of the court record.

(4) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall at the time of sentencing allow the defendant a full hearing on the issue.

(5)(a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(iii) the cost of necessary physical and occupational therapy and rehabilitation;

(iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;

(v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and

(vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsections (5)(a) and (b) and:

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines may make restitution inappropriate.

(d) The court may decline to make an order or may defer entering an order of restitution if the court determines that the complication and prolongation of the sentencing process, as a result of considering an order of restitution under this Subsection (5), substantially outweighs the need to provide restitution to the victim.

Addendum C

**PRIVATE
STATE OF UTAH
ADULT PROBATION AND PAROLE**

Region III – Salt Lake City
36 W. Fremont Ave
Salt Lake City, UT 84101
Phone: (801) 239-2244

PRESENTENCE INVESTIGATION REPORT

Date Due: 02/17/04
Sentencing Date: 02/20/04

Judge Frederick, Third District Court

Salt Lake City, Salt Lake County, Utah
(City) (County)

Peg Stewart, INVESTIGATOR

Name: PEARSON, Richard Warren	Offender Number: 160339
Aliases: none	DAO#: 03020136
Address: 11 Mountainwood Lane Sandy, Utah	Prosecuting Attorney: Anne Cameron
Birthdate: 03/28/41 Age: 62	Defense Attorney: Thomas Rassmussen
	Marital Status: married

<i>Court Case No.</i>	<i>Offense</i>	<i>Plea</i>	<i>Conviction Date</i>
031906848	3 cts. Misuse of Public Money, a Second Degree Felony	Guilty	12/19/03
	Theft, a Second Degree Felony	Guilty	12/19/03
	Communications Fraud, a Second Degree Felony	Guilty	12/19/03

RECOMMENDATION:

It is respectfully recommended by Adult Probation and Parole, Court Services Unit, the defendant be granted the privilege of 36 months supervised probation with the following special conditions:

- 1) Serve 150 days in jail;
- 2) Complete cognitive restructuring classes;
- 3) Pay restitution as determined by the District Attorney's Office;
- 4) May not be employed in a position of financial responsibility; and
- 5) Make restitution payments while incarcerated.

PRESENTENCT REPORT

PEARSON, Richard

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EVALUATIVE ASSESSMENT AND PROBLEM AREAS:

The defendant was interviewed at the office of Adult Probation and Parole. He was cooperative, but he appeared to minimize this offense and place much of the blame on his superiors. The defendant was difficult to interview when discussing the principle behind his actions, as he continued to give examples of other employee's behaviors or particular transactions. He verbalized he was sorry about his actions, but always included others as liable. He stated he gained no benefit from his manipulation of agency accounts, and he acted on behalf of his fellow employees. He indicated he was told by his superiors to find a way to obtain financing for an employee gym. He admitted he broke the law when he opened an account with his social security number, but again he did it for the employees. The defendant also indicated he felt obliged to continue his transactions, as he "saw how Ken (his director) treated other people," and he knows how he acts "if he doesn't get his way." He indicated his superiors "left him out to dry," as there are others in the office who were just as culpable.

He scored on the Level of Service Inventory as low risk to reoffend, and there are no issues of concern other than the number of his current convictions. The defendant's Criminal History Matrix indicated he receive regular probation

This offense involved the defendant misappropriating incoming and outgoing financial transactions of \$131,000 while he acted as General Accountant for the Department of Alcohol and Beverage Commission over a three year period. He has been an accountant for 30 years, and he manipulated the finances without the knowledge of his superiors.

Regarding this offense, the defendant stated, "I'm sorry. I was wrong, just trying to help the employees. I didn't benefit. It was the environment of the office. I truly regret it happened." He indicated he has himself been in positions of authority and law enforcement in the military. The defendant was challenged he may have benefited in other ways besides financial. He stated, "Maybe it was my ego. I don't know. It made me feel better helping people. I have always tried to help people out." Regarding payment of restitution the defendant stated he was willing to pay restitution in addition to others who may be culpable.

The defendant has no criminal history; he served for many years in the military including a tour of duty in the Vietnam War; he is highly regarded by numerous friends and business colleagues as a caring, giving individual; his previous DABC Director Ken Wynn believes jail time is not necessary and he gave a favorable recommendation; he maintained a long term career and stable residence for his family.

The defendant denied any personal benefit and blamed his actions on the intimidation of his two

PRESENTENCT REPORT

PEARSON, Richard

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superiors. He admitted he was wrong, but explained he was only a few years from retiring, he saw the inappropriate activity in the office and became desensitized. According to the State Investigator in this case, the defendant was found to have misused monies over a three-year period; and had they investigated the time prior to this, he believes they would have discovered further misappropriations. The prosecutor indicated these charges were only a representation of the offenses he committed. The defendant denied any financial benefit from his misuse, as it was for his fellow employees benefit, but the investigator reported the defendant admitted to him he purchased personal items with the money, and there is a portion of the misused money still unaccounted for.

The defendant misused \$131,000, of which \$25,000 he used to supply his soccer association with uniforms, and of which a portion remains unaccounted for. He appears to have misused some of this money to benefit his fellow employees by providing a gym with equipment, and provide his superiors with other requested items, but it also appears he benefited perhaps through employee's and his soccer club's accolades; and though he denied this, he benefited monetarily himself. He appears to have purposely failed to keep documentation of all his transactions because he had something to hide.

This agency believes it appropriate the defendant should serve jail time for his actions and then address his thinking errors to help him come to terms and admit his wrongs with sincerity. He is an excellent candidate for probation as he has a stable life with substantial incoming retirement, and has no substance abuse issues. As his household income equals approximately \$14,000 per month, it is recommended he immediately begin making restitution while incarcerated. This agency believes it appropriate the defendant serve 30 days jail for each of his five counts.

OFFENSE:

Plea Agreement:

The defendant was originally charged with Counts I, III and V: Misuse Public Money, a Second Degree Felony; Count II: Theft, a Second Degree Felon; and Count IV: Communications Fraud, a Second Degree Felony. He pled guilty as charged.

Factual Summary of Offense:

The following information was taken from the detailed probable cause statement:

On March 13, 2003, Agent Doug Townsend, State Bureau of Investigation, began investigating a confidential report that someone at the State's Department of Alcoholic Beverage Control (DABC) was authorizing payment of DABC funds to pay for embroidery for Sparta United Soccer uniforms and equipment. The complainant specifically named the defendant as the individual authorizing payments.

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On March 4, 2003, Ken Wynn, Director of the DABC, confronted the defendant about the embroidery and clothing orders for Sparta United Soccer that were being paid for with DABC

PRESENTENCT REPORT

PEARSON, Richard

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funds, authorized by the defendant. The defendant indicated to Wynn that Sparta United Soccer had reimbursed the DABC for all of the expenditures he had authorized the DABC to make on their behalf. That amount, according to the defendant was \$25,777.22. The audit conducted by the State shows that Sparta United Soccer did issue payment to the DABC for the \$25,777.22, but the defendant deposited \$6,755.32 of that (two checks) directly into a Beehive Credit Union account, and that the rest of the money paid by Sparta to the DABC was deposited into the Bank One petty cash account and then redistributed by the defendant without any documentation.

The defendant made the following disbursements between 1999 and 2002, from the Bank One DABC petty cash account without documentation: \$1,040.00 deposited to the Beehive Credit Union Candy account; \$3,139.00 to Bank One, cashed; \$6,550.00 to Cash; \$9,390.00 as paycheck advance to a DABC employee; \$4,512.50 to Harmons for gift certificates for employee Christmas bonuses; \$6,160.00 to HRS/Costco, defendant's personal account; \$5,350.00 to DABC; \$18,107.66, a single disbursement, payable to Richard Pearson; and the defendant received \$12,020.00 in cash back from deposits, including the deposits from the Sparta United checks.

In addition to the above referenced disbursements, the defendant manipulated DABC operating and petty cash accounts, he used DABC funds to pay for the Sparta United Soccer uniforms and equipment in addition to opening the "DABC Candy Account," naming himself as trustee, using his own tax identification/social security number. Furthermore, the defendant disbursed money from the DABC petty cash account and the recycling incentive program to the Candy Account, his personal account, and the Sparta Soccer account and he advanced money to an employee from the petty cash account and then depositing that employee's paychecks into the Candy Account at Beehive Credit Union. The defendant disbursed DABC funds to himself, without any documentation or written authority.

The approximate amount of DABC money misappropriated by the defendant is \$131,541.13. This amount is the aggregate of misappropriated disbursements from the DABC petty cash account at Bank One, recycling incentive money, which was never deposited into an official DABC account, and DABC money used to pay for Sparta United Soccer clothing and equipment.

Defendant Statement:

Please see attached statement.

Comments:

The defendant's statement is lengthy, but the defendant indicated his full version of this case was described in the document. In reviewing this, the fifteen pages include numerous examples and descriptions of transactions, the demands of his superiors, and the behavior of individuals whom he worked with.

Custody Status:

The defendant was booked and released on October 14, 2003, and he spent zero days in jail.

CRIMINAL HISTORY:

The defendant has no known criminal history other than the present offense.

VICTIM IMPACT STATEMENT AND RESTITUTION:

Contact was made with the **Director of DABC, Ken Wynn**, who stated he worked with the defendant for 25 years, and he found him to be a good friend and a good person. He was surprised by this incident. He indicated the defendant has a big heart, and he felt he did this to help other people and with no malice. Mr. Wynn stated he would hate to see the defendant go to jail. He felt he made a stupid mistake, but he still considers him a friend.

Phone contact was made with **State Auditor Julie Wrigley**, who performed the audit in this case. She indicated the defendant submitted his own documentation to account for \$36,000, in addition to a list from Harmon's documenting employee certificates purchased. Ms Wrigley reported it appears a good portion of the misused money was spent legitimately, but there is still a portion unaccounted for, and the defendant kept no documentation of his transactions. During the investigation, the defendant reported he was owed the money and he paid himself back, but as he kept no documentation he was unable to articulate how he was able to track the amount.

Restitution will be determined by the District Attorney's office.

DEFENDANT'S LIFE HISTORY AND CURRENT LIVING SITUATION:

The defendant was born in Sioux City, Iowa to Ann and John Pearson in 1941. He reported he had a happy normal childhood, with no major problems though his parents divorced and remarried. He was raised in a middle-income environment. He completed high school and then graduated from Coe College as a 2nd Lieutenant. He served in the Air Force until 1975, and then he obtained an Accounting Degree at Weber State College.

The defendant has lived in Utah since 1969, after a tour of duty in Vietnam. He has been married for 30 years to Dora and they have a 16-year old son, Trevor. They have lived in the same home since 1986. He retired from the reserves in 1991, and he collects retirement from the DABC and the military. He currently has a good relationship with his mother, who resides in Iowa, though she is unaware of this case. His father and stepfather are deceased, as is his only brother. He has no contact with his stepsiblings. He enjoys a relationship with his wife's family, and he socializes occasionally with couple of close friends, but in general he considers himself a loner.

During the past six years he has been involved in the Sparta Soccer Club. Last year he coached his niece's soccer team, and he was also involved with his son's soccer team. The defendant indicated his wife and son are very concerned about this case, but they are supportive. His wife works for the IRS, and he stated this is also a concern for her.

EDUCATION, EMPLOYMENT AND FINANCIAL INFORMATION:

The defendant graduated from high school in 1959, and he obtained a BA in Political Science, and a BS in Accounting. He served in the Air Force from 1963 to 1975, and he was employed with the DABC from December 1976 to January 2003, when he retired. He now collects monthly retirement of \$3,097 from DABC; \$2,395 from the military; \$1,359 from social security; and \$867 from social security for his son, until he is age 18; and his wife earns \$75,000 per year. His household income totals approximately \$14,000 per month.

He reported the following financial obligations:

Wells Fargo, mortgage	\$1,409	\$68,242 (valued at \$337,100)
Beehive CU, 2 nd mortgage	866	52,854
Infinity, auto	524	9,452
Blazer, auto	363	10,865
Corvette, auto	363	10,865

Revolving accounts:

AAFES	100	3,991
Dillards	152	1,817
Discover	147	2,343
Nordstrom	100	1,190
Nordstrom VISA	417	13,889
First USA	91	4,492
First USA	91	4,577
Sears	100	3,476
Ultimate-GE	160	1,936
Wells Fargo Mastercard	102	2,208
Wells Fargo VISA	100	1,377

Other:

Zions Parking	72
Pepperwood	91
Metropolitan	587

SUBSTANCE ABUSE HISTORY/MENTAL HEALTH:

The defendant reported he has one or two drinks three times per week, and he has never used illicit drugs. He has no substance abuse concerns.

The defendant described his physical health as good. He has high blood pressure, but he controls this with medication. He described his emotional health as "fine." He is experiencing a "little stress," but he indicated his wife and son are more stressed. He has no mental health concerns, nor has he in the past.

COLLATERAL CONTACTS:

Phone contact was made with **State Bureau Investigator Doug Townsend**. He stated the defendant embezzled \$131,000 and the defendant claimed he could account for most of it; but he was spending it, living on it and spending it on his wife. He believed the defendant diverted money to Sparta Soccer League more than what was found. The defendant provided copies of checks totaling several thousand dollars, but he diverted this into his own account. Investigator Townsend believes the defendant did benefit financially from his actions by commingling funds by moving money back and forth from the petty cash account to his own account. He was spending money for his own personal items, including cartons of cigarettes for his wife and other items from Costco. He reported the defendant admitted to him he purchased cigarettes, DVDs and other personal items. He also found there were many avenues the defendant embezzled money, but they picked only three years of impropriety to focus on. He believes the defendant's misuse went beyond three years. He believes the defendant has a few dishonest bones in his body, and had they gone back before 1999 they would have found more.

Investigator Townsend was asked about his sentencing recommendation. He stated the defendant has paid somewhat of a price by being forced to retire and have his name smeared in the press; and he will never be employed as an accountant again. He believes the defendant should do some jail time, as he was convicted of five 2nd degree felonies, and pay restitution. He is not sure prison would serve its purpose.

Phone contact was made with **prosecutor Anne Cameron**. She stated the defendant still refuses to accept responsibility or see that he did anything wrong. The office climate may have been bad, but he was in a position to say no. She will reserve her recommendation for the day of sentencing.

A message was left with the defendant's attorney **Thomas Rasmussen**, but a return call was not received prior to the submission of this report.

Phone contact was made with the **defendant's wife, Dora Pearson**. She stated she has been married to the defendant for 31 years. They have a strong marriage and the defendant is the strength of their marriage. She still cannot believe this has happened. She knows they did not receive anything monetarily from his actions. She stated this was so out of character for her husband, as he has always been more of a giver than a taker. She stated if they were out to a restaurant and he was under charged, he would point this out, and that is the kind of person he is. She believes he would have had to be under a lot of pressure to act this way. She is very stressed about this case as the defendant is trying to protect her by not sharing all the information. She believes he may have been left out to dry and other employees might be afraid to step forward. She believes there had to be others in the office who knew of his activities. Their son is very worried about him, as they have a very close relationship.

Attached are numerous letters of support from the defendant's friends and family.

Respectfully submitted,

Peg Stewart, Investigator

Approved:

Gerald R. White, Supervisor
Court Services Unit

FORM 1

CRIMINAL HISTORY ASSESSMENT

These are guidelines only They do not create any right or expectation on behalf of the offender.

PRIOR FELONY CONVICTIONS
(SEPARATE CRIMINAL CONVICTIONS)

0 NONE
1 ONE
2 TWO
3 THREE
4 MORE THAN THREE

PRIOR MISDEMEANOR CONVICTIONS
(SEPARATE CRIMINAL CONVICTIONS)
(INCLUDES DUI & RECKLESS)
(EXCLUDES OTHER TRAFFIC)

0 NONE
1 ONE
2 TWO TO FOUR
3 FIVE TO SEVEN
4 MORE THAN SEVEN

VIOLENCE HISTORY
(PRIOR JUVENILE OR ADULT CONVICTION FOR AN OFFENSE WHICH INCLUDES USE OF A WEAPON, PHYSICAL FORCE, THREAT OF FORCE, OR SEXUAL ABUSE)

0 NONE
1 MISDEMEANOR
2 3RD DEG FEL
3 2ND DEG FEL
4 1ST DEG FEL

WEAPONS USE IN CURRENT OFFENSE
(ONLY WHEN CURRENT CONVICTION DOES NOT REFLECT WEAPON USE OR WHEN STATUTORY ENHANCEMENT IS NOT INVOLVED)

1 CONSTRUCTIVE POSSESSION
2 ACTUAL POSSESSION
3 DISPLAYED OR BRANDISHED
4 ACTUAL USE
6 INJURY CAUSED

PRIOR JUVENILE ADJUDICATIONS
(ADJUDICATIONS FOR OFFENSES THAT WOULD HAVE BEEN FELONIES IF COMMITTED BY AN ADULT & THREE MISDEMEANOR ADJUDICATIONS EQUAL TO ONE FELONY ADJUDICATION)

0 NONE
1 ONE
2 TWO TO FOUR
3 MORE THAN FOUR
4 SECURE PLACEMENT

TOTAL PLACEMENT SCORE: 0

SUPERVISION HISTORY
(ADULT OR JUVENILE)

0 NO PRIOR SUPERVISION
1 PRIOR SUPERVISION
2 PRIOR RESIDENTIAL PLACEMENT
3 PRIOR REVOCATION
4 ACT OCCURRED WHILE UNDER CURRENT SUPERVISION OR PRE-TRIAL RELEASE

SUPERVISION RISK
(ADULT OR JUVENILE)

0 NO ESCAPES OR ABSCONDINGS
1 FAILURE TO REPORT (ACTIVE OFFENSE) OR OUTSTANDING WARRANT
2 ABSCONDED FROM SUPERVISION
3 ABSCONDED FROM RESIDENTIAL PROGRAM
4 ESCAPED FROM CONFINEMENT

CRIMINAL HISTORY RISK	
V	16+
IV	12-15
III	8-11
II	4-7
(I)	0-3

CRIME CATEGORY

	A	B	C	D	E	F	G	H	I
	1 st Degree Murder	2 nd Degree Death	1 st Degree Person	3 rd Degree Death	1 st Degree Other	2 nd Degree Person	3 rd Degree Person	2 nd Degree Other	3 rd Degree Other
V	24 yrs.	8 yrs.	10 yrs.	48 mos.	84 mos.	60 mos.	36 mos.	30 mos.	20 mos.
IV	22 yrs.	7 yrs.	9 yrs.	42 mos.	78 mos.	48 mos.	30 mos.	24 mos.	
III	20 yrs.	6 yrs.	8 yrs.	36 mos.	72 mos.	36 mos.			
II	18 yrs.	5 yrs.	7 yrs.	24 mos.					
I	16 yrs.	4 yrs.							

CONSECUTIVE ENHANCEMENTS: 40 % of the shorter sentence is to be added to the full length of the longer sentence.
CONCURRENT ENHANCEMENTS: 10 % of the shorter sentence is to be added to the full length of the longer sentence.
Matrix timeframes refer to imprisonment only. Refer to the categorization of offenses.
Capital offenses are not considered within the context of the sentencing guidelines.

ACTIVE CONDITIONS

CRIME CATEGORY

TIME

MOST SERIOUS 3 cts Misuse of Public Money, II I 22.4 mths.

NEXT MOST SERIOUS Theft, II

OTHER Communications Fraud, II

OFFENDER NAME: PEARSON, Richard DATE SCORED: 02/12/04 SCORER'S NAME: P. Stewart

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PEARSON, Richard

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AGGRAVATING AND MITIGATING CIRCUMSTANCES

(Use Form 3 also for Mandatory Imprisonment Sex Offender Sentences)

Circle the numbers of circumstances that may justify departure from the guidelines. Reference the page number of the Presentence investigation where the judge can find supportive information.

This list of aggravating and mitigating factors is non-exhaustive and illustrative only.

Aggravating Circumstances

Only use aggravating circumstances if they are not an element of the offense.

PSI Page #

- _____ 1. Established instances of repetitive criminal conduct.
- _____ 2. Multiple documented incidents of violence not resulting in conviction. (Requires court approved stipulation)
- _____ 3. Offender presents a serious threat of violent behavior.
- _____ 4. Victim was particularly vulnerable.
- _____ 5. Injury to person or property loss was unusually extensive.
- _____ 6. Offense was characterized by extreme cruelty or depravity.
- _____ 7. There were multiple charges or victims.
- _____ 8. Offender's attitude is not conducive to supervision in a less restrictive setting.
- _____ 9. Offender continued criminal activity subsequent to arrest.
- _____ 10. Sex Offenses: Correction's formal assessment procedures classify as an high risk offender.
- _____ 11. Offender was in position of authority over victim(s).
- _____ 12. Other (specify)

Mitigating Circumstances

- _____ 1. Offender's criminal conduct neither caused nor threatened serious harm.
- _____ 2. Offender acted under strong provocation.
- _____ 3. There were substantial grounds to excuse or justify criminal behavior, though failing to establish a defense.
- _____ 4. Offender is young.
- _____ 5. Offender assisted law enforcement in the resolution of other crimes.
- _____ 6. Restitution would be severely compromised by incarceration.
- _____ 7. Offender's attitude suggests amenability to supervision.
- _____ 8. Offender has exceptionally good employment and/or family relationships.
- _____ 9. Imprisonment would entail excessive hardship on offender or dependents.
- _____ 10. Offender has extended period of arrest-free street time.
- _____ 11. Offender was less active participant in the crime.
- _____ 12. All offenses were from a single criminal episode.
- _____ 13. Offender has completed or has nearly completed payment of restitution.
- _____ 14. Other (specify)

PLEASE COMPLETE THIS SECTION

DAYS OF JAIL CREDIT: 0 days _____
GUIDELINE MATRIX RECOMMENDATION: probation _____
AP&P RECOMMENDATIONS: probation _____
REASON FOR DEPARTURE: N/A _____

OFFENDER NAME: PEARSON, Richard DATE SCORED: 02/24/04 SCORER'S NAME: P. Stewart

PEARSON

When the Department moved into the new building, I was in meetings with Dennis Kellen and Ken Wynn. During these meetings it was decided to have a physical fitness facility for the employees. I was assigned the project. At the time, Gordon Crabtree was the Director of Finance. Gordon advised that only departments with police or firefighters were authorized to have fitness facilities paid for by the State. I apprised Dennis and Ken of this information. There was still interest in trying to find ways to get our own fitness facility. At about this time, there was an article in the state newspaper that was distributed with employee paychecks about the new physical fitness facility in the Capitol Building for employees on Capitol Hill. I visited the facility to see the layout of their exercise equipment. I subsequently met with Lynn Velinga and asked him how they paid for the equipment in the Capitol's fitness facility. At first he told me Capitol Hill employees held bake sales and the proceeds were used to buy the equipment. I told Lynn there was no way the proceeds from bake sales would be sufficient to buy the equipment presently in the Physical fitness facility. Lynn then told me that if a film company used the Capitol or other state facility, they would "request" the rental income money be a donation to the Capitol Hill Physical Fitness Facility. I returned to the office and apprised Dennis and Ken of this information. I told them I would have to be creative like the capitol to finance our Fitness facility. Both told me to proceed and get the fitness facility going and do whatever I needed to get it done.

Richard Pearson

Meetings were held with our employees. Questionnaires were distributed for them to complete asking if they would join the facility if it were available and be willing to pay a monthly fee, and what type of exercise equipment they wanted the Department to obtain. Almost everybody advised they would join and use the facility and be willing to pay a reasonable monthly fee. I was then instructed by Ken and Dennis to acquire equipment for the fitness facility.

Dennis was on the Board of Directors at Beehive Credit Union. This coupled with my using my SSN enabled the Candy Account to get a loan. The Department could not get a loan using the Department Federal ID Number. A few times prior to the Department receiving the initial equipment, Dennis came to my office and told me to get moving on the training facility. He said Ken was getting impatient and wanted to get the gym setup.

At first we bought used equipment. One of the first pieces of equipment was a used Trotter treadmill. We immediately started having problems with this piece of equipment as when it was used it drew too many amps causing it to overheat and blow fuses. It seemed that Ken was primarily the person using the treadmill when it broke down. Ken never said anything to me. It was always Dennis who came to me. I could tell by Dennis's attitude and body language when he told me to get the treadmill fixed, that Ken was either upset, irritated or both. I knew fixing the treadmill was a priority project. Ken used the treadmill early in the morning before the employees arrived. We tried everything to reduce the friction that caused the treadmill to draw excessive amps and blow fuses. The bed and belt were replaced. We lubricated the bed to reduce the friction when the belt passed over the bed. Nothing worked. The treadmill continued to

overheat and blow fuses. Each time Dennis would come to my office and tell me to get the problem resolved as Ken wasn't happy.

During 1998, Dennis came to my office and said Ken hated his office furniture. Ken wanted this furniture replaced with the same furniture (desk and credenzia, etc) he had in his old office. A review of purchasing guidelines disclosed that the only office furniture the department could purchase was office furniture that was either on state contract or manufactured by the prison industries. Dennis advised that Ken did not want either of these options. The furniture had to be the same as the furniture he had in his old office. It turned out that the furniture he had before was manufactured by Steelcase and was sold by Midwest Office Supply. This furniture was neither on state contract or manufactured by prison industries. The desk and credenzia cost \$4,171.00 and was paid for by a cashier's check. The table cost \$985.00 and was paid for with a state warrant request.

Employees have always been able to borrow equipment from the Department. If an employee had a project and the Department did not have the tool, the Department would buy the tool in question. We would then have the tool on hand if the Department actually needed the tool at a later date. The maintenance shop and kitchen were covers for these expenditures. We needed all types of tools and equipment to maintain our stores and office complex. Also, the Department had a first rate kitchen. We were always getting kitchen utensils for our employees to use or support the numerous conferences the Department hosted. Our building was popular as it was new and had good facilities. If the Department's tools were damaged or stolen, Dennis and Ken appeared to be upset. Within reason, damaged or stolen equipment could be used as a

PRESENTENCT REPORT

PEARSON, Richard

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cover if a person wanted a certain piece of equipment purchased for themselves. Ken would never ask for anything. Dennis would always come to my office and request items to be purchased. This was not a daily or weekly occurrence. I do not recall how often this occurred, but it was frequent.

Examples of employees damaging equipment include, not changing vacuum cleaner bags or using it to vacuum up wood chips. At times, the vacuum cleaner bag would be so packed with dirt that the bag was hard as concrete and the tube leading to the bag would also be full of dirt. The wood chips would restrict movement of the beater bar on the vacuum. In both instances, this caused the motor to overheat and burn up and they would have to be replaced.

A wood chipper was ruined as the person who borrowed it left it outside all winter causing it to rust. Also, melting snow left in the chipper would refreeze ruining the chipper's internal parts. During one winter, a carpet cleaner was left in an unheated garage at a home freezing the pump. This ruined both of these items and the chipper and carpet cleaner had to be replaced. Dennis told me that Ken had borrowed both items. This happened approximately four years ago.

Two or three years ago Dennis told me to buy at Costco a Tila foodsaver. This product vacuum seals food products. Dennis said that Ken and Brad Brown were going on a fishing trip to Alaska. Ken wanted this to vacuum pack the fish they were going to catch and bring back to Utah. It was purchased. However, the vacuum sealer was ruined in Alaska because water was sucked into the motor area and it shorted out the unit. I was then told to buy a replacement for the burned out unit.

Food, candy, soft drinks, etc was purchased for the office. The candy and drinks were purchased for the machines in the office. This was put into the "secret room". This was a nickname the employees gave the room as access was restricted. People with access would fix breakfast or lunch for themselves or others. This was primarily Ken and Dennis. If there were a conference or other activity, I would buy extra food for this purpose. Nuts, candy, (red vines, gummy bears, licorice, etc) was specifically purchased for Ken and Dennis and was kept on their desk. Employees would go into their offices and help their self to these items. If the nuts and candy containers were empty, employees would call and ask for replacements from the secret room. This is an example of items I was requested to buy but there were so many that they are too numerous to recall. Depending upon the item, the items were paid for by cash, credit card, or a warrant. Items I purchased were either left in my office or in the secret room and then they would disappear. Items taken home were usually taken from the office early in the morning before the employees arrived at work. Items also disappeared from the supply room in the warehouse and tools from the maintenance area located in a portion of the club store. I have been told the following items have been returned to the office since initiation of this investigation: snow blower, lawn tractor, storage shed, Circulon cooking set, turkey fryer, and a Tila food saver. I purchased the turkey fryer as Dennis said Ken wanted it. Dennis returned the other mentioned items. Adolph Trujillo discovered the lawn tractor, snow blower, and the unassembled storage shed. The lawn tractor was found in our locked fenced parking or storage area adjacent to our North Temple liquor store. The snow blower was in the paint room located in the warehouse. The unassembled storage shed was found hidden behind the steel storage containers located

on the northeast corner of our property near the new warehouse addition. The tractor and snow blower were found in locked areas that required keys to gain access.

Another example was disk shredders. Data wanted one. Costco was selling them for approximately \$200.00. I purchased one. Data liked the unit so much that they requested two more. I put the two shredders in my office and called Kevin Perry. He came to my office and left with the shredders. The two shredders have not been seen again in the office unless they were returned after June 27, 2003. I was asked why I did not say no. This is difficult, but I will try. I know I did wrong. I have always obeyed and respected our country's laws. I gradually became desensitized I guess we (I and the others in the office) were justifying it because we were not benefiting personally. The employees were. I got away from what my true responsibilities were. Also, for the past three or four years I was not happy. Ken was getting difficult to work for. Ken also held grudges. If you got on his bad side it was difficult to overcome. Also, others did not say "no" either. Examples of this are as follows:

1. The listing committee has five members: Ken, Dennis, Dallas Froisland, Brett Clifford, and Wayne Olson. If a new product was presented by Stew Campbell or Boyd Harris (deceased) who were close friends of Ken's and the other members of the committee knew Ken strongly supported the listing, the listing would pass even though the Department had numerous products in that category and price range. The product would not pass if Ken were indifferent or did not make it known that he wanted it approved.
2. The second example is how Ken treated Kelly McEntire and Benito (Ben) Quinonez. During the past few years, Ken has become close with Shawna

Praszynski, an area supervisor. How close I do not know but many rumors about their relationship has been circulated in the office. He would take her to Jazz games, golfing, clubs, etc. Shawna was a vindictive person and would influence Ken in his treatment of others. She used this relationship to criticize Kelly and Ben over what she perceived poor work performance. All three worked for Dennis. Instead of discussing with Dennis she would go straight to Ken with her complaints. Ken then dealt with Kelly and Ben. I do not know how Ken handled Kelly and Ben, but I know from their comments that Ken made their lives miserable. I asked Dennis why he didn't reign in Shawna or protect Ben and Kelly from her since they worked for him. His silence was telling. I could tell it bothered him that Shawna reported directly to Ken and did not come to him when she had something to say. The situation got so bad that Ben asked a lawyer he played basketball with who would be a good hostile work environment lawyer. Last year when Ken was gone for a week, Kelly complained to Dennis of the hostile work environment resulting from Ken and Shawna's relationship. Dennis spent the week defusing the problem. Dennis was worried because Kelly's file was well documented. Shawna was not discreet in describing her activities with Ken and used it as a weapon against others when it suited her. Kelly would overhear conversations she had with others as his office was located adjacent to hers. He would then document her comments. A large number of the women in the office were friendly with Shawna out of fear because of her relationship with Ken. Marlene Schmidt called Shawna a mean, vicious person. Another time, Penni Hulse made an unfavorable comment about Shawna. I jokingly told Penni

that I would tell Shawna what Penni had said. Even though I told Penni I would not tell Shawna what Penni had said, Penni was concerned and immediately called Shawna and told her not to believe anything I might say. There is sympathy for Shawna now as she is fighting cancer.

3. Benito left the department to become a broker with Spirits West. He advised that his new supervisor told him the following. Ken Wynn had Mel Stevens, a Utah liquor broker, contact Benito's future supervisor at Spirits West to tell him not to hire Benito. I think Mel sold some or all of his lines to Spirits West. This is an example of how mean and vindictive Ken can be. He doesn't do questionable things himself but uses other people to get what he wants done or accomplished.

On occasion, Ken has made inappropriate comments regarding women. An example of this is as follows. Dennis told me that during a NABCA Administrators Conference, Ken was counseled by Jim Squi (phonetic), an NABCA Administrator, on the proper way to treat women. Ken apparently had been drinking too much and made either inappropriate comments or advances. I believe the conference was in New Hampshire. Dennis also told me that Billy Hestor, a North Carolina county liquor administrator, called him and told him that he had counseled Ken the previous evening on the proper way to treat women. Ken again had been drinking too much and either made inappropriate comments, advances or both. I do not know the specific details regarding either situation but I do know that Dennis was concerned and that's why he discussed it with me. I am sure that Dennis also told this information to Dallas and Earl.

On two other occasions, Dennis said he overheard Ken make inappropriate comments to Shawna while she was in Ken's office. They are as follows. One time Ken said

something to Shawna like she had nice "tits". Another time Ken told Shawna she had a nice "ass". Dennis could easily overhear this as he and Ken have adjoining offices. The door between their offices is usually open. I know Dallas and Earl knew of these comments. I discussed this with both of them and they both cringed. Nobody stepped up to Ken and discussed with him his and Shawna's relationship. I know that this was because they were afraid of potentially incurring his wrath.

Ken traveled for NABCA and he was reimbursed by NABCA. Every time he traveled he traveled by airplane. According to Dennis, he would however get reimbursed for mileage as if he drove an automobile instead of the cost of an airplane ticket. I was told that the reimbursement for mileage would be more than the cost of an advance purchased airplane ticket and he could then pocket the difference. I asked Dennis why he didn't file his vouchers claiming mileage instead of the actual cost of the airplane ticket and replied that only Directors were allowed to do this.

Ernie had his heart attack during the latter part of calendar year 2000 and either retired or is drawing disability payments. We kept in touch. He was always short of money and was always borrowing money. On two occasions, dates not recalled, he said his home was in foreclosure. He needed \$3000.00 each time. Each time I discussed this with Rae Jordison and then Ken. Each time Ken approved the loan and the money was given to Ernie. The second time Ken said to tell Ernie that this would be the last loan. I told this to Ernie. Ernie had to know that Ken knew about the loans and that the money was not mine.

Shortly after Ken's second term as president of NABCA, Ken took Earl Dorius, Dennis, Dallas, me, and our wives to the New Yorker for dinner. Ken gave each wife a

present and made comments about their husbands. He stated that he could depend upon me to obtain anything he needed.

Shawna was jealous and possessive person regarding her relationship with Ken. One time, within the last three or four years, Ken called MarJean Short on his cell phone while he was in San Francisco. He was in front of a shop and saw something she might be interested in. When Shawna found out Ken called MarJean and not her, Shawna was very upset and let others in the office know about it.

One afternoon after work, date not known, Ken and Shawna were going out together for the evening. Kelly overheard Shawna ask Ken in a low voice if she was following him or he was following her.

On another occasion, Kelly overheard Dennis talking with Ron White, former DABC maintenance supervisor. They were discussing the purchase of power tools for the Department. Dennis told Ron to purchase an extra tool of each type for him (Dennis).

Kelly advised me that Dennis and Ken would use the Department's store auditors to manipulate the system to buy expensive single malt scotch at a bargain price. Dennis and/or Ken would search each store's inventory on the computer identifying which store had one or two bottles of a slow moving single malt scotch. They were also on the lookout for "leakers" of single malt scotch. Leakers could not be sold and would be charged back to the company that sold them to the Department. After the single malts were located, the store auditors, normally Jerry Bauman, went out to the stores to pick up the breakage or leakers that could not be sold. The leakers were supposed to be destroyed. I believe Jerry coded the slow moving items and leakers as distressed merchandise. Ken and Dennis would then buy these items for \$3.00 a bottle. These single malts normally

sold for at least \$30.00. The department lost revenue on these transactions. I knew something like this was going on, but did not know the details. I had overheard one of the auditors talking with Dennis about this. He asked Dennis if he needed anything as he was going to the stores and would pick it up for him. The auditor indicated that after the bottle was coded on the transfer, the bottle would disappear in the system.

Both Dallas and MarJean told me that when Ken and Dennis came to work early they would check out the sample room to see what samples were received the previous day. Ken would come in as early as 3:00 AM and Dennis would arrive between 4:00 and 5:00 AM. Both Dallas and MarJean were concerned as they believed vodkas and single malt scotches were missing and that either Ken or Dennis or both were taking them.

As I previously said, the candy fund was always short of money. One day, date not recalled, Rae and I were discussing this. Rae told me that the checks from Telecheck came directly to her and did not go through the normal process. She could give me the checks and we could use them and nobody would know. This was because the checks were not logged in.

On numerous occasions, Janise Branstiter would call me. She would advise me that she was in possession of a payment or reimbursement. She advised she was going to deposit the money into petty cash or the candy fund to be used for the benefit of the employees. I concurred.

Brad Brown at times bragged that I could get anything and that the Department never had budget shortages. When he made these comments I was concerned as I wished he wasn't so vocal and attract attention. Dallas also made comments that every organization

needed a "dog robber" or scrounger like me. Dallas also knew I was playing financial games to buy the equipment and certificates. He didn't know how I was doing it.

On occasion Dallas and I would talk. I expressed concerns about how Dennis and Ken could discipline store personnel for taking peanuts when they were getting so much more.

MarJean told me that the whole office knew I was buying items for Ken and Dennis. They would see me leave and return with numerous items that would either go to their respective offices or to the secret room.

Ken would make it difficult for his managers to supervise. He would become friendly with certain employees that he liked being with. For example, Adolph and Ernie Trujillo were welcomed in his office at any time. They would come to Ken's office and while there they would criticize their supervisor, Ron White. Ron wasn't the best supervisor, but he did not have a chance. I told Dennis that Jesus couldn't supervise Adolph or Ernie. No matter what Ron did, Adolph and Ernie would go to Ken. Ken would then get involved with Dennis, Ron's supervisor, and discipline Ron. He also became friendly with Harlene Buccabusso, an accounting technician. She would complain about Rae's negative management style. It was difficult to defend Rae as he (Ken) had already made up his mind based upon what Harlene had told him. Others in the office defended Rae to me saying Harlene was lazy, made numerous errors, and read the newspaper the first couple of hours each day. It was a difficult situation for me until Harlene retired. I don't even think that Rae was aware of the situation since I didn't discuss it with Rae as I didn't think that Harlene's comments had merit. Ken allowed people he liked to influence him and did not look at all the facts before making up his

mind. With Rae, his mind was already made up based upon Harlene's comments. Once Harlene left, Rae's situation improved as Ken never brought the topic up again.

Ken states that he signed blank checks and did not know what they were for. He did this on occasion. However, the vast majority of the time I would go to him to get a check signed and he would ask me what the check was for. I would tell him the purpose of the check. If Ken did not ask me what the check was for and signed checks not knowing their purpose, he was not fulfilling his responsibilities as the Director. He was responsible to know what the check was for before he signed the check. The same applies to Dennis. The Commission secretary had Dennis and Ken's signature stamp locked in a cabinet. I did not have the key. If I needed a second signature and Dennis and Ken were not there, I would explain to the secretary what the check was for before she stamped the check. If nobody was there, I was out of luck as the check didn't get signed and I would have to wait until the next day.

Lynn Staley told me that he has done many small things for Ken. One example, he and Ken took a generator from the office to Ken's house in a state van. He said you do not say no to Ken. He also told me that he knew I was buying items for Ken and Dennis as he went shopping with me several times and saw what I was buying and knew who it was for.

Another example is that Dennis told me to buy a color printer for Ken's home. I purchased the printer. Then during working hours, Ken drove Chris Christensen, a department employee, in a state van to his house to setup and install the printer for him.

Our store auditors gave the Budweiser and Carlson checks to me. They worked with the beer distributors and they knew that the money was being used for the employees to

buy certificates and/or exercise equipment. I do not remember the details of the checks for surplus property and don't remember them coming to me. Also, I don't remember anything about the reimbursement check for Dennis travel for NABCA.

I did not have contact with Telecheck, the beer distributors, etc. Other employees had contact with these organizations. I did not open the mail. Other employees opened the mail. I was not the lone ranger doing the actions that I have been accused and charged with. A lot of people in the office were involved with me and I did not ever use threats or intimidation. I did not reconcile the bank statements. In fact, I rarely ever saw them as they were reconciled and filed by others. Nobody in the office ever questioned the checks or deposits to petty cash. I have been told that I am missed and that the employees want to help me but are afraid of reprisals or repercussions that may result.

It is preposterous that Ken and Dennis thought that the Candy money paid for employee certificates, gym equipment, loan payments, etc. Candy fund profits could not possibly have paid for these items. Other employees knew along with Ken and Dennis. If Ken had wanted it stopped he could have done it at any time but instead did nothing. In sexual harassment and hostile work environment situations I believe the supervisor cannot say he did not know the situation existed. It is his responsibility to know and correct the situation. It is the same with this situation. If he claims he didn't know, he should have!

Listed below is the money we are talking about:

Recycling incentives	\$15,596.71
Sparta checks	\$25,777.22
Telechecks	\$25,101.03
Budweiser/Carlson	\$ 6,272.00
DABC surplus property	\$ 2,495.00
NABCA (Dennis check)	<u>\$ 1,841.60</u>

PRESENTENCT REPORT

PEARSON, Richard

Page 26

TOTAL \$77,086.56

The candy fund made money but I do not know how much. I did not take the money out of the machines nor did I count the receipts. I received money from Rae Jordison from time to time to buy merchandise. I would also check with her to see how much additional money we needed for certificates at yearend. Listed below are expenditures I made during the years:

Loan Payments		
1997	\$ 882.00	
1998	\$2,431.00	
1999	\$2,881.00	
2000	\$2,431.00	
2001	\$3,159.05	
2002	<u>\$2,609.95</u>	\$14,394.00
Equipment		
1999	\$7,931.00	
2000	<u>\$3,115.00</u>	\$11,046.00
Harmon Certificates		
1998	\$5,035.00	
1999	\$4,370.00	
2000	\$4,750.00	
2001	\$5,595.50	
2002	<u>\$6,622.70</u>	\$26,373.20
Cash to employees in lieu of certificates		
1999	\$ 600.00	
2000	\$ 600.00	
2001	\$ 600.00	
2002	<u>\$ 600.00</u>	\$ 2,400.00
Smiths Certificates	<u>\$ 2,000.00</u>	
TOTAL		\$56,213.20

In addition to the above, the Department, with Ken's approval, loaned Ernie Trujillo \$6,000.00. The following items were also purchased and there is no record on

the department books or inventory record for these items, as they were not paid for out of the departmental funds but with the diverted money:

Loans to Ernie Trujillo	\$ 6,000.00
Ken's office furniture	\$ 4,171.00
Chipper	\$ 1,450.00
Lawn Tractor	\$ 2,499.00
Lawn Tractor	<u>\$ 2,499.00</u> (approximately)*
TOTAL	\$16,000.00

After the investigation opened, Dennis came to my office and asked how Dora, my wife, was taking the situation. I told him that she was very upset and distraught. I told Dennis that based on what I told her, she thought that he, Ken, and everybody else in the office was just as guilty as me. Dennis concurred. Also, during one of our conversations, Dennis said that if the State did not like how we financed the gym that the State should investigate other agencies to determine how their fitness facilities were financed.

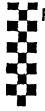
Benito told me that Shauna in the presence of him, Karen Stackhouse, Bill Garner, and others said that she, Shauna, and Ken were going out that night. Karen made the comment that the "old man was going to get lucky tonight".

Shortly after the Jerry Seiner dealership opened on 5th West near our office Dennis came to my office. He said that the dealership had a good drive thru car wash. The car wash was open to the public. Tokens could be purchased to wash state vehicles. Tokens could also be given to certain employees to wash their own vehicles. I went to Jerry Seiners to purchase tokens and found out that tokens were not issued but paper receipts with a code number that was to be entered prior to getting the vehicle washed. The receipts were only valid for 30 days. A credit card could not be used to purchase the car washes so I had to use cash. Over time I purchase several hundred dollars worth of

car washes. I gave Dennis 4 or 5 of these receipts every time a purchase was made and the balance of the receipts to Janice. Dennis used these receipts to wash his personal vehicle(s). Others also used these car wash receipts to wash their own vehicles by going to Janice and indicating that they were going to wash a state vehicle and then would turn around and use it on their personal vehicle.

Several years ago Ken had the interior of his house painted. I believe our maintenance people purchased the paint, brushes, rollers, etc for this job. Also, when Ken was roofing his house the department purchased the nails and tarpaper for this job. Ken purchased the shingles but the department purchased an air gun that was used to nail the shingles to the roof.

At his house, Dennis had a workshop attached to his house. I think that the department also purchased tools that he had in his workshop. Dennis made oak furniture. I do know that the oak Dennis used to make the furniture was purchased by our maintenance department and paid for by the State. I was told this oak was very expensive.



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P.1

Feb 6, 2004

To whom it may Concern:

I have known

Richard Pearson for a number of
years. He is a very good friend.

I believe him to be a very honest
and loyal person and very Considerate
of other people.

Sincerely

James E. McQuinn

Feb 09 04 09:35a

GARY PARKER

8012822207

①

AGI Distributing, Inc.
3601 South 2700 West
West Valley City, Utah 84119
(801) 635-4756

February 8, 2004

Ms. Pegeen Stewart

RE: Character Reference Letter for Mr. Richard Pearson

Dear Ms. Stewart:

I have owned and operated a business for 15 years that is located in the West Valley area. Presently I reside in West Jordan. In addition to my duties as a business owner I provide for my family of five and hold a calling in my church. I am also involved with charitable organizations such as being a volunteer in the Big Brother/Big Sister program for three years. Organizations such as this, return to me much more satisfaction than the time that I offer them.

I have known Richard Pearson for the past thirteen years. During this time Richard has been a return customer to my business. During the last several years Richard and I have formed a personal relationship and spend much free time together. Based on my assessment of his character over this time I have come to discern that he is honest, sincere, loyal and a very good father. He also spends countless hours performing volunteer work with children and agencies geared to help children. As my personal relationship has grown with Richard, I have also learned much concerning his honesty and integrity. As a tribute to his honesty the following accounts are briefly provided:

A few years ago Richard visited our video game store in West Valley to trade some games and purchase others. It was very busy that day, and our sales clerk had given him credit for one of his games twice. The following day Richard noticed this additional credit on his receipt and called to return the money. As small business owner, I very much appreciated this act since small amounts greatly impact our profitability and my own livelihood.

In the past I have also observed him inform a waitress at a restaurant of an ordered item that she failed to place on his bill and charge him for.

Based on my information concerning Richard's character if the opportunity arose I would immediately hire Richard to oversee the financial aspects of my business due to his proficient accounting skills.

PRESENTENCT REPORT
PEARSON, Richard
Page 31

Feb 09 04 09:35a

GARY PARKER

8012822207

P. 3

③

AGI Distributing, Inc.
3601 South 2700 West
West Valley City, Utah 84119
(801) 635-4756

Richard's single most positive character trait is his countless hours he spends conducting volunteer work with children. He has spent the last 10 years volunteering for the Sparta United Soccer Club. I have been invited to work with him on numerous fund raising activities for the club. As a person who does volunteer work, I can very much appreciate his efforts for the children.

Richard's one fault in life is that he consistently places the needs and concerns of other people before his own. Based on my personal knowledge, Richard is an outstanding part of our community that makes this world just a little bit better.

Thank you for your valuable time. If you have any questions or desire further information please do not hesitate to contact me at (801) 635-4756 or write to the above address.

Gary R. Parker
President




AGI Distributing, Inc.


GroupWise WebAccess Message Item

Page 1 of 1

Mail Message

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From: "Sparta United Soccer Club" <sparta@spartaunited.com>
To: Pegeen Stewart
Date: Friday - February 6, 2004 11:37 AM
Subject: Richard Pearson
 Mime 822 (1729 bytes) [View](#) [Save As](#)

I am writing to you in regards to Richard Pearson. I have known Richard for seven years, since his son, Trevor joined the soccer club. Richard is the hardest worker in the organization. He will volunteer to help, no matter the task. It would be impossible to calculate the hours of service Richard has devoted to the soccer community. Richard sincerely cares about the welfare of the children. If a child does not have the financial resources to play or travel to out of state tournaments, Richard makes sure the player is able to participate with his team. Richard does not expect recognition or accolades for his work. He receives the reward of knowing he is helping the children.

Sincerely,
Ben Vandenhazel

GroupWise WebAccess Message Item

Page 1 of 1

Mail Message

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From: Lynn Staley
To: Pegeen Stewart
Date: Friday - February 6, 2004 11:42 AM
Subject: Richard Pearson

February 4, 2004

To Whom It May Concern:

I am writing to you to provide a character reference for Richard Pearson whom I have known as a supervisor, administrator and friend for a period of 28 years.

I first met Richard in 1976 and since that time I have had the opportunity of knowing and working with him in a variety of projects and situations. Many successes with which I have been credited are a direct result of Richard's counsel and advice.

With integrity, with caring, with determination and an unselfish respect for those who may be struggling, Richard has exuded concern and motivated me and others in a way that has been supportive and accepting. I believe that our department's history of high morale and low employee turn-over can be partly attributed to Richard's influence.

Of those many times when I have confided in and sought Richard's in-put and opinion, I've admired his well balanced style and his emphasis to loyalty. I have visited him recently and I am aware that he feels great remorse for the unfortunate mistakes that he has made. I can assure you that he does recognize their seriousness and the impact those mistakes have had on our department and our state.

With regard to Richard's guilty pleas and the issues concerning his trust and responsibility, I emphatically believe that it would be to the advantage of all that his sentence may be restricted to probation.

Richard is, and will always be, one of the finest people that I have ever met. I am happy to write this in his behalf and I thank you for taking the time to read it.

Most sincerely,

Lynn Staley

I have known Richard Pearson for almost 33 years. He married my sister. He has been a good provider for his family and very supportive to members of my family, especially my mother, brother, and uncle.

When Richard married into my family it did not take long for him to become an important part of our lives. My mother thought the world of him and they became not only family but also the best of friends. He was always so kind and spent a lot of time with her. He took my mother on trips, bought her new clothes, and assisted her almost every day when she was bedridden and dying from cancer. He would drive from Salt Lake City to Ogden to take her to her doctor or to the hospital for her treatments. He did his best to make her final days comfortable. My mother loved him and he loved her. He was a wonderful son-in-law and brother-in-law. During her illness when she needed help he never ever complained or thought of her care as a burden. He was always there to help and could never do enough.

My brother lived in his house before he was killed. He provided him free board and room and helped him buy a car. He was not just a brother-in-law but also a good friend. When my brother was shot, Richard took the phone call from the police and immediately went to the hospital. When he arrived at the hospital he was informed that my brother had died on the way to the hospital and it was him that notified the family. His support and kindness during this time was an immense strength to my family and me.

I also had an uncle who was over 70 years old and lived with my mother. When my mother passed away, my wife and I moved into her house and tried to take care of him but we were young and it was hard so Richard and my sister moved him into their home and became his caregiver. My uncle had been a bachelor all his life and had no other immediate family still living. During the years my uncle lived with them he became increasing worse and eventually lost complete control of his bodily functions. Every day, up to the time of his death, Richard would go home and clean, bath, and dress my uncle. Richard never complained or looked on this as a burden. He was always there when help was needed. My uncle lived with them until his death and I know it was not an easy time for them but they did this out of love for him and for my mother, as her last wish was that her brother was taken care of when she was gone. They never even thought or considered taking the easy way out and putting him in a nursing home. I am proud to say he is my brother-in-law and I consider him like a brother. My family and sister are blessed to have him.

For approximately 12 years Richard has been involved in youth soccer. My personal experience has been during the past year. He coached my daughter's U-6 girls soccer team. They could not find anybody in the Roy area to coach the team so we asked Richard to do it. He drove three times a week from Sandy to Roy to train the girls. All of the parents will tell you they trust and treasure him. The little girls on the team looked forward to seeing Richard and enjoyed having him as their coach.

PRESENTENCT REPORT

PEARSON, Richard

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I was 21 when my mother died. Richard has been very good to me ever since he came into our family. There is nothing he wouldn't do for my family or me. I have always looked up to him and I know that I can count on him. He is a kindhearted person. I can honestly say that I have never heard him say an unkind word about others. I know that he cares about others and has a big heart and would never knowing hurt another person. He is a loving and giving person.

Richard Weeding

PRESENTENCT REPORT
PEARSON, Richard
Page 36

FEB-05-2004 THU 10:32 AM DEPT ALC BEV CONTROL

FAX NO. 8019776888

P. 02

February 5, 2004

Pegeen Stewart

A case before you concerning Richard Pearson

Richard has been a friend, is a friend and will be a friend in the future, having said that, I recognize that mistakes have been made.

I have known Richard for about twenty-five years. Over those years I have come to like the man. I have come to know him as generous and willing to help when I have been in need.

I believe, in this case, there is room for leniency and compassion. That is my plea.

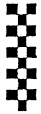
Thank you for receiving my note and considering this plea.

Dallas R. Froisland
Director of Purchasing
Utah Department of Alcoholic Beverage Control

PRESENTENCT REPORT

PEARSON, Richard

Page 37



P. 81

1/26/04

TO: STATE OF UTAH
ATTN: PEG STEWART
633-9429 FAX 239-2184

SUBJECT: LETTER OF CHARACTER
RICHARD PEARSON

I HAVE KNOW RICHARD FOR ABOUT TWENTY YEARS. I HAVE KNOWN
HIM BOTH THRU BUSINESS AND COMMUNITY ACTIVITIES.

RICHARD IS A COMMUNITY SERVICE ORIENTED PERSON HELPING MANY
OF THE LOCAL YOUTHS THRU ATHLETICS. HE IS A DEDICATED INDIVIDUAL
IN HELPING MANY OF HIS ASSOCIATES . HE IS A GOOD LOYAL FRIEND.

HOWARD RINDLISBACHER

PRESENTENCT REPORT
PEARSON, Richard
Page 38

FEB-10-2004 TUE 03:53 AM AD CENTIVES FAX NO. 18014874126 P. 01



3030 South Main Suite 400
Salt Lake City UT 84115
801 487-4123 F
801 487 4126 F
800 378-4123 UT ^{Salt Lake} Feb 6 2004

Att; Peggy Stewart

From: Ellen Molletti

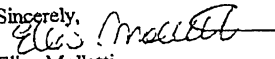
Dear Peggy,

As an account executive representing my previous company I had the privilege of doing business with Richard Pearson for five years. He has been very involved in the soccer community, and well respected by his associates at Sparta United.

As one forms a working relationship over several years, you do get to know a person over time, it is my opinion that Richard is straight forward, and cared about his associated and staff. He is an upstanding member of the community. I have also got to know some of the employees at DABC and it is my understanding that Richard was and is well respected, trusted, and liked by his peers at DABC.

In closing Richard has always in business matters, he has my utmost respect.

Sincerely,


Ellen Molletti

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Addendum D

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IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY
SALT LAKE COUNTY, STATE OF UTAH

-o0o-

STATE OF UTAH,)	
)	
Plaintiff,)	Case No. 031906848
)	
vs.)	<u>SENTENCING</u>
)	
RICHARD WARREN PEARSON,)	(<u>Videotape Proceedings</u>)
)	
Defendant.)	

-o0o-

BE IT REMEMBERED that on the 20th day of
February, 2004, commencing at the hour of 9:02 a.m., the
above-entitled matter came on for hearing before the
HONORABLE J. DENNIS FREDERICK, sitting as Judge in the
above-named Court for the purpose of this cause, and that
the following videotape proceedings were had.

-o0o-

A P P E A R A N C E S

For the State:	CLARK A. HARMS Deputy Salt Lake County District Attorney 111 East Broadway, Suite 400 Salt Lake City, Utah 84111
For the Defendant:	THOMAS V. RASMUSSEN Attorney at Law 4659 South Highland Drive Salt Lake City, Utah 84117

FILED DISTRICT COURT
Third Judicial District

FILED

FEB - 2 2005

UTAH APPELLATE COURTS

FEB 03 2005

By bn SALT LAKE COUNTY
Deputy Clerk

1
ALAN P. SMITH, CSR
385 BRAHMA DRIVE (801) 266-0320
SALT LAKE CITY UTAH 84107

ORIGINAL



P R O C E E D I N G S

MR. RASMUSSEN: Your Honor, we're ready on No. 19, the Pearson matter.

THE COURT: Very well.

State of Utah vs. Richard Warren Pearson. This is Case No. CR03848.

Mr. Rasmussen, you're here on behalf of this defendant?

MR. RASMUSSEN: Correct.

THE COURT: And for the State?

MR. HARMS: Clark Harms for the State, your Honor.

THE COURT: All right, Mr. Harms. Thank you.

And you are Richard Warren Pearson; is that correct, sir?

MR. PEARSON: Yes, your Honor.

THE COURT: Mr. Rasmussen is your lawyer; is that correct?

MR. RASMUSSEN: Yes, your Honor.

THE COURT: For the record, this is the time set for sentencing. The defendant entered pleas of guilty on the 19th of December of last year, to five separate second-degree felony charges, misuse of public money, two counts; theft, one count; and communications fraud, the fifth count, one count on that one.

1 A pre-sentence report was then ordered, has now been
2 received and reviewed.

3 Mr. Rasmussen, you've seen that report?

4 MR. RASMUSSEN: I have, your Honor.

5 THE COURT: Is there any legal reason known to you
6 why I should not impose sentence at this time?

7 MR. RASMUSSEN: I am not aware of one.

8 THE COURT: Before I do so, do you wish to say
9 anything on behalf of Mr. Pearson?

10 MR. RASMUSSEN: I do, your Honor.

11 With respect to the pre-sentence report, just a
12 couple of comments. First of all, the Court may recall that
13 at the time that we entered the pleas, there was a
14 recommendation by the State that no prison be imposed and that
15 the sentences on all five counts run concurrently. We
16 understand that the final decision is vested in the Court, but
17 I wanted just to reiterate those recommendations as they were
18 stipulated to at the time of the plea.

19 Having said that, we agree with the recommendations
20 in the pre-sentence report. We think that the pre-sentence
21 report is thoughtful. We think that it takes into account the
22 fact that Mr. Pearson has never been in trouble before. We
23 think it takes into account the motivation behind some of the
24 deeds which he did and we would ask the Court to follow the
25 recommendations as they're outlined.

1 THE COURT: All right, Mr. Rasmussen. Thank you.
2 Mr. Pearson, before I decide what to be done here,
3 do you have anything to say?
4 MR. PEARSON: No. I'm just sorry it happened, I
5 wish I would have had the strength to say no, at the time.
6 I'm sorry to put my family through all this distress and
7 embarrassment and just apologize to the Court and to the State
8 and everybody else involved.
9 THE COURT: All right, Mr. Pearson.
10 Mr. Harms, does the State have a recommendation?
11 MR. HARMS: Your Honor, Ms. Cameron's
12 recommendation, which I make on her behalf, was that Mr.
13 Pearson receive concurrent sentences and that he not be
14 sentenced to prison at this time.
15 THE COURT: And--and that is specified in the pre-
16 sentence agreement--
17 MR. HARMS: Yes.
18 THE COURT: --as her recommendation?
19 MR. HARMS: It is, your Honor.
20 THE COURT: All right. Anything contrary to what is
21 recommended here by A P & P?
22 MR. HARMS: No, your Honor, just to point out again,
23 I know the Court is well aware of this case, but the State, in
24 a sense, is truly the victim in this case, as opposed to where
25 we stand in place of the victim, where Mr. Pearson had the

1 gate-keeper function at the Division of Alcohol Beverage
2 Control, was responsible for improper use of State funds and
3 in the discharge of his duties, misappropriated over \$130,000,
4 of which \$53,793 went directly to his personal accounts.

5 In addition, since these charges were filed, the
6 A.B.C. was required to pay off a Costco credit card bill, the
7 entirety of which were purchases for Mr. Pearson's personal
8 benefit. That amounts to \$6,856. We're requesting
9 restitution in the amount of \$60,649.

10 I believe that Mr. Pearson is contesting the
11 restitution and so we'd be asking the Court to set a
12 restitution hearing.

13 THE COURT: The number that's contained within the
14 pre-sentence report specifically is 131,541.13. Does that
15 number include your 53 plus 6,800?

16 MR. HARMS: No. It does not include the 6,800.
17 That number is the number that the Utah State Auditor's Office
18 came up with as the total amount misappropriated; however, the
19 auditors also determined about 76,000 were improper
20 disbursements, but went to the benefit of the department or
21 other department members. And so, they're not quite sure how
22 to deal with that and your Honor's going to have to decide
23 that at the restitution hearing.

24 THE COURT: All right, Mr. Harms. Thank you.

25 Then there is no legal reason why I should not

1 impose sentence at this time--

2 MR. RASMUSSEN: No.

3 THE COURT: --known to you, Mr. Rasmussen?

4 MR. RASMUSSEN: No.

5 THE COURT: It is the judgment and sentence of this
6 Court, Mr. Pearson, that you serve the term provided by law in
7 the Utah State Prison of one to 15 years for each of the five
8 separate second-degree felony charges to which you have pled
9 guilty. I will order that those terms be served consecutively
10 and not concurrently.

11 I will, based upon the recommendations that have
12 been made to me and the fact that you have no prior criminal
13 history whatsoever, suspend the imposition of the prison term
14 and place you on probation subject to the following terms and
15 conditions:

16 One. You will serve a term in the Adult
17 Detention Center of 150 days.

18 You will complete cognitive restructuring
19 classes.

20 You will pay restitution in the amount of
21 \$131,541.14 until such time and if that number is modified by
22 this Court.

23 And you will make regular monthly installment
24 payments on that amount so that the ultimate conclusion will
25 be that at the end of your 36-month probation, which I am

1 placing you on, that sum will be paid in full.

2 You will not be employed during the course of
3 this probationary term in a position of financial
4 responsibility where you have access to the money of other
5 persons.

6 You will make restitution as I have indicated
7 during the course of your probationary term and that will
8 commence at such time as the order is signed.

9 Now, Mr. Pearson, do you understand?

10 MR. PEARSON: Yes.

11 THE COURT: I am of the view at this stage that the
12 restitution sum will be as I've indicated unless I modify it
13 and that leaves open the potential for negotiation between
14 your lawyer and those at the State who do have knowledge about
15 what their records reflect. If there is no satisfactory
16 conclusion by either party, then you're to notify this Court,
17 Mr. Rasmussen, and I will set the matter for an evidentiary
18 hearing.

19 MR. RASMUSSEN: Thank you.

20 THE COURT: At which time, all of the claims will be
21 inquired into and a determination will be made; but until and
22 unless that occurs, the number is now specified.

23 MR. RASMUSSEN: Okay.

24 THE COURT: Mr. Pearson, you are to report to the
25 Adult Detention Center Monday morning, next, at 9:00 a.m. for

1 your 150 days' service.

2 Is there anything further?

3 MR. HARMS: Yes, your Honor. The statutes provided
4 for, and the information provided notice of, a request on
5 behalf of the State that this Court, pursuant to Section
6 76-8-404, disqualify Mr. Pearson from the--any public office
7 or public employment for the rest of his life.

8 THE COURT: Well, that, of course, will be the
9 order--

10 MR. HARMS: Thank you.

11 THE COURT: --since it is statutorily required.

12 MR. HARMS: Thank you, your Honor.

13 MR. RASMUSSEN: Thank you.

14 THE COURT: All right. Good luck to you folks.

15 MR. RASMUSSEN: Okay. Thank you.

16 THE COURT: You bet.

17 (Whereupon, this hearing was concluded.)

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* * *

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TRANSCRIBER'S CERTIFICATE

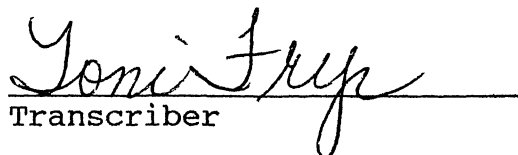
STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, Toni Frye, do hereby certify:

That I am a transcriber for Alan P. Smith, Certified Shorthand Reporter and a Certified Court Transcriber of Tape Recorded Court Proceedings; that I received an electronically recorded videotape of the within matter and under his supervision have transcribed the same into typewriting, and the foregoing pages, numbered from 1 to 8, inclusive, to the best of my ability constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 27th day of
January, 2005.


Transcriber

Subscribed and sworn to before me this 27th day
of January, 2005.

Notary Public

(S E A L)

Addendum E

THOMAS V. RASMUSSEN, #2693
Attorney for Defendant
4659 So. Highland Drive
Salt Lake City, Utah 84117
Telephone: (801) 484-3000
Facsimile: (801) 273-1089

DISTRICT COURT
04 JUL 19 PM 12:39
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
CHD
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MOTION
	:	TO WITHDRAW AS COUNSEL
Plaintiff,	:	
vs.	:	Case No. 031906848
RICHARD PEARSON,	:	
Defendant.	:	Judge: <i>Frederick</i>

Thomas V. Rasmussen, Attorney for Defendant, hereby requests an Order to Withdraw as Counsel from the above-entitled matter, based on the fact that all legal services for which Counsel was retained have been completed and resolved.

DATED this 16 day of July, 2004.

Thomas V. Rasmussen
THOMAS V. RASMUSSEN
Attorney for Defendant

CERTIFICATE OF MAILING

The foregoing Motion to Withdraw as Counsel and Order to Withdraw as Counsel was hand delivered/facsimiled/mailed postage pre-paid to the Salt Lake District Attorney's Office, 111 East Broadway, Salt Lake City, Utah 84111.

Defendant:

Richard Pearson
11 Mountainwood Lane
Sandy, Utah 84092

DATED this ____ day of July, 2004.

JOHN BLAIR HUTCHISON #1607

Attorney for Defendant

427 27th Street

Ogden, UT 84401

Phone: 801-622-9100

Fax: 801-394-7706

04 SEP 13 PM 1:53

[Signature]
CLERK

**IN THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH**

STATE OF UTAH, Plaintiff, v. RICHARD WARREN PEARSON, Defendant.	: : : : : :	NOTICE OF ENTRY OF APPEARANCE AS COUNSEL, MOTION FOR RESTITUTION HEARING AND REQUEST FOR DISCOVERY Case No. 031906848 <i>Frederick</i>
---	----------------------------	---

Comes now, John Blair Hutchison, Attorney at Law, who hereby enters his appearance as counsel for the defendant in the above-entitled matter upon the charges of: **THREE (3) COUNTS OF MISUSE OF PUBLIC MONEY, THEFT and COMMUNICATIONS FRAUD** and further, requests a Restitution Hearing on behalf of said defendant. Pursuant to Rule 16, Utah Rules of Criminal Procedure, the prosecutor is requested to furnish documentation as to how the Restitution amount of \$131,541.13 was calculated that the defendant has been ordered to pay.

DATED this 8th day of September 2004.

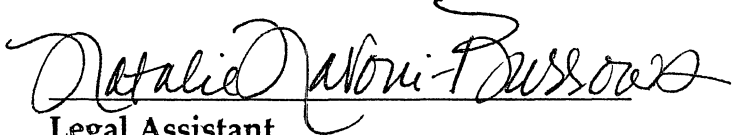
[Signature]
JOHN BLAIR HUTCHISON
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I faxed and/or mailed, postage prepaid, a true and correct copy of the original on the 8th day of September 2004 to the following:

Anne A. Cameron
Salt Lake County Attorney's Office
2001 S. State #S3600
Salt Lake City, UT 84190
Fax: 801-468-2622

Court Clerk
Third District Court
450 S. State Street
P.O. Box 1860
Salt Lake City, UT 84111
Fax: 801-238-7404


Legal Assistant

Addendum F

P R O C E E D I N G S

MR. YENGICH: Good morning, your Honor. May we do State of Utah vs. Richard Pearson. I'm here, standing in for John Hutchison.

THE COURT: What number is that--

MR. YENGICH: I'm sorry.

THE COURT: --Mr. Yengich? Is it a sentencing?

MR. YENGICH: It is a motion that Mr.--

THE CLERK: 11.

THE COURT: No. 11?

MR. YENGICH: No. 11. And--

THE COURT: Very well. State of Utah vs. Richard Warren Pearson, Case No. CR03848. Mr. Yengich appearing for this defendant and--

MS. CAMERON: Anne Cameron for the State.

THE COURT: --and Ms. Cameron for the State.

And you, sir, are Richard Warren Pearson; is that correct?

MR. PEARSON: Yes, your Honor.

MR. YENGICH: If--if it please the Court?

THE COURT: Yes. Go ahead, Mr. Yengich.

MR. YENGICH: Yes. Mr. Hutchison contacted me. He is unable to be here today. He has requested that this matter be set over for three weeks. And as I understand it, Ms.

1 Cameron has no objection to that.

2 MS. CAMERON: That is correct, your Honor; however,
3 after speaking with Mr. Yengich, I think three weeks may fall
4 on a day where I am not present and we need to change that.

5 THE COURT: We'll continue it to the next available
6 day--date, in the range of the three-week period, if there's
7 no objection from the State and I assume, this--this is a
8 restitution issue that we're dealing with here, isn't it?

9 MR. YENGICH: That is correct, your Honor.

10 MS. CAMERON: That's right.

11 THE COURT: We'll continue it to--

12 THE CLERK: November 5th.

13 THE COURT: --November the 5th.

14 MS. CAMERON: That will be great.

15 MR. YENGICH: Thank you, your Honor. And I'll--and
16 Mr. Hutchison will be here on that day.

17 THE COURT: Now, I assume that there is effort
18 underway to provide the documentation that is to be--

19 MS. CAMERON: I've been out of the office for the
20 past week, your Honor. I did indicate to Mr. Hutchison, that
21 previous defense counsel has all documentation. There were
22 thousands of pages of documentation; therefore, my office--

23 THE COURT: Right.

24 MS. CAMERON: --has not reproduced all of those.

25 MR. YENGICH: John has indicated to me that he's

1 provided them to a--an accountant to review, so I think they
2 have it.

3 THE COURT: Okay. So that information's been
4 obtained by Mr. Hutchison?

5 MR. YENGICH: That's correct.

6 THE COURT: And being analyzed at this time.

7 MR. YENGICH: It is, your Honor.

8 THE COURT: All right. Mr.--

9 MR. YENGICH: I--

10 THE COURT: Go ahead.

11 MR. YENGICH: I'm sorry.

12 I will advise Mr. Hutchison to be ready on that date
13 with that information.

14 THE COURT: And you, Mr. Pearson, are in agreement
15 with this request to continue this matter for--

16 MR. PEARSON: Yes, your Honor.

17 THE COURT: --that period?

18 All right. Then if there's nothing further, that'll
19 be the order.

20 MR. YENGICH: Thank you, your Honor. May we be
21 excused?

22 THE COURT: Yes, you may. Thank you.

23 (Whereupon, this hearing was concluded.)

24

25

* * *

TRANSCRIBER'S CERTIFICATE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, Toni Frye, do hereby certify:

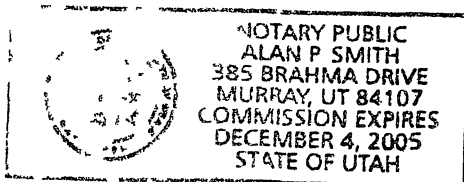
That I am a transcriber for Alan P. Smith, Certified Shorthand Reporter and a Certified Court Transcriber of Tape Recorded Court Proceedings; that I received an electronically recorded videotape of the within matter and under his supervision have transcribed the same into typewriting, and the foregoing pages, numbered from 1 to 4, inclusive, to the best of my ability constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 27th day of January, 2005.

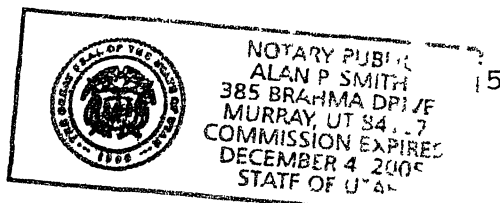
Toni Frye
Transcriber

Subscribed and sworn to before me this 27th day of January, 2005.



Alan P. Smith
Notary Public

(S E A L)



Addendum G

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

NOV 16 2004

SALT LAKE COUNTY

By JLB
Deputy Clerk

THE STATE OF UTAH,

Plaintiff,

vs.

RICHARD WARREN PIERSON,

Defendant.

MINUTE ENTRY

Case No. 031906848

Hon. J. DENNIS FREDERICK

November 12, 2004

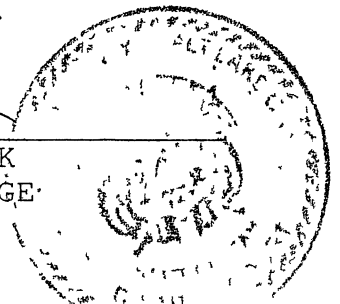
The above-entitled matter comes before the Court pursuant to Defendant's Motion for Restitution Hearing and Request for Discovery. The Court heard oral argument with respect to the Motion on November 5, 2004. Following the hearing, the matter was taken under advisement. The Court having considered the motion and memoranda, as well as the arguments of counsel, hereby enters the following ruling.

Pursuant to Utah Code Ann. § 77-38a-302(4), Defendant's request is untimely as the motion was not made, nor any objection voiced, until seven months after the sentencing. Moreover, the presentence report in this case provides an accurate outline of the amounts misused and their destinations, and defendant had access to this report and the discovery which detailed the State's accounting. Finally, in State v. Weeks, 2002 UT 98, 61 P.3d 1000, the Utah Supreme Court held that restitution based upon the information in a presentence report is a sufficient basis upon which the Court may determine an order of restitution.

In light of the forgoing, Defendant's Motion for Restitution Hearing and Request for Discovery is not well taken and, accordingly, denied.

DATED this 15th day of November, 2004.

J. DENNIS FREDERICK
DISTRICT COURT JUDGE

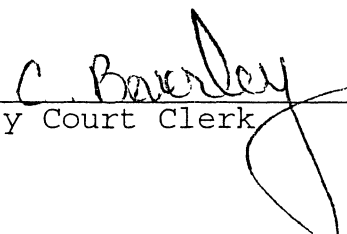


CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 031906848, by the method and on the date specified.

METHOD	NAME
Mail	ANNE A CAMERON ATTORNEY PLA 111 E BROADWAY STE 400 SALT LAKE CITY, UT 84111
Mail	JOHN BLAIR HUTCHISON ATTORNEY DEF 427 27TH ST OGDEN UT 84401

Dated this 16th day of Nov., 2004.



Deputy Court Clerk